

FEBRUARY, 1957  
Volume 2, Number 1

# Race Relations Law Reporter

A Complete, Impartial  
Presentation of Basic  
Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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# RECENT DEVELOPMENTS

## . . . A Summary

### Education

The validity of new state laws, enforcement methods, and the timing of desegregation plans are among the questions treated in the public education developments reported in this issue.

**TIMING:** The United States Court of Appeals for the Sixth Circuit rejected a plan previously approved by a federal district court in *Tennessee* by which admission to state-supported colleges would be opened without regard to race (p. 64). The plan provided for non-restrictive admission to be made effective over a five-year period, beginning with graduate students. In *Nashville, Tennessee*, a federal district court approved, in part, a city school plan for admission on a racially non-discriminatory basis, applicable to the first grade in 1957 (p. 21). The court directed the school board to present, by the end of 1957, a definite schedule for the desegregation of other grades.

The Court of Appeals for the Fourth Circuit affirmed decisions requiring admission of Negroes to schools in *Charlottesville* and *Arlington County, Virginia* (p. 59). The court held injunctive orders requiring immediate integration in one case and within approximately six months in the other to be reasonable.

The federal district court in *Delaware* declined to dismiss a case, on a motion based on failure to allege present feasibility, in which integration of schools in that state was being sought (p. 7). In *Maryland* the federal district court required the exhaustion of state administrative remedies before court action for admission to schools (p. 11).

**LEGISLATION:** *Virginia* legislation, the "Pupil Placement Act" under which school pupils would be assigned to schools by a three-member state board, has been declared unconstitutional by a federal district court in that state (p. 46). The court looked to other *Virginia* laws adopted at the same time, to a resolution of interposition and to statements of the governor in determining that the act required the board to consider the race of the pupil in making assignments. The constitutionality of the *North Carolina Pupil*

Enrollment Act was not questioned, however, by the federal Court of Appeals for the Fourth Circuit in requiring that administrative remedies under the act be exhausted before court review is sought (p. 16).

The *Tennessee* General Assembly has enacted several laws designed to deal with the situation resulting from the decisions in the *School Segregation Cases* (beginning at p. 215). Among these are a "Pupil Assignment Act" (p. 215) and an act to authorize racially separate schools at the voluntary election of parents (p. 215).

**ENFORCEMENT:** The decree of a federal district court requiring non-interference with the court's previous order directing a school board in *Clinton, Tennessee*, to admit Negroes on a racially non-discriminatory basis has been deemed applicable to persons not specifically named in the decree (p. 26). Contempt proceedings have been instituted against a number of persons in this case for alleged interference with the carrying out of the court's original order.

**OTHER DEVELOPMENTS:** The Supreme Court of *Pennsylvania* has affirmed the decision of a Pennsylvania Orphan's Court holding the decision in the *School Segregation Cases* to be inapplicable to a school established by private trust administered, in part, by municipal officials. "State action" was not found to be involved (p. 68).

In a case arising in *Texas* the Court of Appeals for the Fifth Circuit held that a federal district court should retain jurisdiction of a school integration case even though it did not appear that Negroes were presently being denied admission to schools because of race (p. 28). Also in *Texas* a federal district court dismissed by agreement and with nominal damages, a case brought on behalf of school children of Mexican descent who were separated in early grades allegedly because of inability to speak English (p. 34).

A congressional subcommittee investigating schools in the *District of Columbia* has recommended the re-segregation of public schools there (p. 207). The superintendent of schools submitted a report to the Board of Education

FEDERAL JURISDICTION: A Study of the Authorized Area of Action of  
United States Courts

Page 269

of the *District of Columbia* commenting on that report and recommendation (p. 210). Problems of "de facto" segregation arising from patterns of racial residential settlement are involved in a study being conducted by a commission of the *New York City* Board of Education (p. 231).

#### Transportation

Efforts to require the discontinuance of racially separated seating on city buses in *Montgomery, Alabama*; *Dallas, Texas*; *Miami* and *Tallahassee, Florida*; and *Columbia, South Carolina*, are reflected in cases arising in those cities. The *Montgomery, Alabama*, cases include the dissolution of a temporary restraining order which had been entered against the city bus company to require it to enforce segregation (p. 121) and action directed against a private "car pool" operated during a bus boycott in that city (pp. 123, 126). The *Dallas, Texas*, case was a suit to require the city transit company to continue racially separate seating arrangements on its buses (p. 146). The suit was dismissed by a state court. In *Miami, Florida*, a federal district court, in entering an interlocutory order in a bus suit, stated that segregation laws of that city and state are unconstitutional (p. 129). The *Tallahassee, Florida*, developments include action by the city to regulate the operation of car pools by Negroes boycotting the city buses (p. 143) and to require the bus company to continue segregated seating (pp. 135, 137). In *South Carolina*, a suit for damages involving the city buses of *Columbia* was returned, on a second appeal, to a federal district court for a hearing on the merits (p. 144).

#### Housing

A suit seeking bi-racial occupancy of public housing in *Savannah, Georgia*, involving both state and federal agencies was remanded by the Court of Appeals for the Fifth Circuit for a

hearing on its merits (p. 109). In *Birmingham, Alabama*, a suit involving occupancy of public housing facilities on a racially non-discriminatory basis was dismissed by a federal district court because of misjoinder of parties (p. 107). The question whether tax exemptions allowed to private concerns for the construction of housing makes such housing "public housing" was involved, though not decided, in *Connecticut* (p. 160). In *Colorado*, a state court held that a racially restrictive covenant applicable to a private home was not enforceable in the state courts (p. 200).

#### Governmental Facilities

The Court of Appeals for the Fifth Circuit has affirmed a federal district court's holding that a restaurant operated in a county courthouse in *Texas* must serve customers regardless of race or color (p. 117). That court also affirmed the decision of the federal district court in *Florida* requiring the admission of Negroes to beaches and swimming pools in *St. Petersburg* (p. 119).

#### Other Developments

The National Association for the Advancement of Colored People was the subject of suits in state courts in *Alabama* (p. 177), *Georgia* (p. 181), and *Louisiana* (p. 185), each seeking to obtain information concerning the membership and finances of the Association. The admission of Negroes to a labor union in *Wisconsin* was involved in court action in that state (p. 151). Railroad employees in *New Jersey* obtained an agency order against a railroad in that state requiring the discontinuance of racially discriminatory employment practices (p. 237). Discrimination in elections as against Negroes was involved in a case arising in *Georgia* (p. 163) and in *Utah* as against Indians (p. 166).

# TABLE OF CONTENTS

## UNITED STATES SUPREME COURT

### Trial Procedure

#### GRAND JURIES

*Alabama:* Fikes v. Alabama, p. 5

#### Miscellaneous Orders, p. 5

## COURTS

### Education

#### PUBLIC SCHOOLS

*Delaware:* Evans v. Bd of Trustees of Clayton School Dist. No. 119 (USDC), p. 7

*Florida:* Gibson v. Bd of Public Instr. of Dade County (USDC), p. 9

*Maryland:* Moore v. Bd of Education of Harford County (USDC), p. 11

*North Carolina:* Carson v. Warlick (USCA, 4th Cir.), p. 16

*Tennessee:* Kelley v. Bd of Education of Nashville (USDC), p. 21

*McSwain v.* Bd of Education of Anderson County (USDC), p. 26

*Texas:* Avery v. Wichita Falls Ind Sch Dist (USCA, 5th Cir.), p. 28

*Bell v. Rippy* (USDC), p. 32

*Hernandez v. Driscoll* Consolidated Independent School Dist (USDC), p. 34

*Virginia:* Adkins v. School Bd of Newport News; Beckett v. School Bd of Norfolk (USDC), p. 46  
School Bd of Charlottesville v. Allen; School Bd of Arlington County v. Thompson (USCA, 4th Cir.), p. 59

#### COLLEGES AND UNIVERSITIES

*Tennessee:* Booker v. Bd of Education (USCA, 6th Cir.), p. 64

#### PRIVATE SCHOOLS

*Pennsylvania:* Estate of Stephen Girard (Pa Sup Ct), p. 68

#### Governmental Facilities

#### PUBLIC HOUSING

*Alabama:* Watts v. Housing Authority of Birmingham (USDC), p. 107

*Georgia:* Heyward v. Public Housing Administration (USCA, 5th Cir.), p. 109

#### RESTAURANTS

*Texas:* Derrington v. Plummer (USCA, 5th Cir.), p. 117

#### SWIMMING POOLS

*Florida:* City of St. Petersburg v. Alsup (USCA, 5th Cir.), p. 119

### Transportation

#### BUSES

*Alabama:* Montgomery v. Montgomery City Lines (Ala Cir Ct), p. 121

*Montgomery v. Montgomery Improvement Asn* (Ala Cir Ct), p. 123

*Browder v. City of Montgomery* (USDC), p. 126

*Florida:* Garmon v. Miami Transit Co. (USDC), p. 129

*Inter Civic Council of Tallahassee v. City of Tallahassee* (USDC), p. 143

*City of Tallahassee v. Cities Transit, Inc.* (Fla County Ct), p. 135

*Cities Transit, Inc. v. City of Tallahassee* (USDC), p. 137

*South Carolina:* Flemming v. S. C. Elec. & Gas Co. (USCA, 4th Cir.), p. 144

*Texas:* Frazier v. Dallas Transit Co. (Tex Dist Ct), p. 146

### Employment

#### LABOR UNIONS

*Wisconsin:* Ross v. Evert (Wis Cir Ct), p. 151

#### RAILROADS

*Federal Statutes:* Pennington v. Missouri Pacific Railroad Co. (USCA, 8th Cir.), p. 157

### Public Accommodations

#### APARTMENTS

*Connecticut:* McKinley Park Homes v. Commission on Civil Rights (Conn County Ct), p. 160

### Elections

#### REGISTRATION

*Georgia:* Harris v. Echols (USDC), p. 163

#### VOTING

*Utah:* Allen v. Merrell (Utah Sup Ct), p. 166

### Trial Procedure

#### ARGUMENT OF COUNSEL

*California:* People v. Linson (Calif Sup Ct), p. 171

#### PETIT JURIES

*Arkansas:* Payne v. State (Ark Sup Ct), p. 171

*Tennessee:* Rosenthal v. State (Tenn Sup Ct), p. 176

### Corporations

#### NAACP

*Alabama:* Ex Parte NAACP (Ala Sup Ct), p. 177

*Georgia:* Williams v. NAACP (Ga Super Ct), p. 181

*Louisiana:* Louisiana ex rel. Gremillion v. NAACP (La Ct of App), p. 185

**Aliens****IMMIGRATION**

*Federal Statutes:* United States ex rel. Lee Kum Hoy v. Shaughnessy (USDC, USCA 2d Cir), pp. 189, 193

**Real Property****RESTRICTIVE COVENANTS**

*Colorado:* Smith v. Clark (Colo Dist Ct), p. 200

**Defamation****NEWSPAPER ADVERTISEMENTS**

*Georgia:* Anderson v. Atlanta Newspapers, Inc. (Ga Sup Ct), p. 204

**LEGISLATURES****Education****PUBLIC SCHOOLS**

*District of Columbia:* Report of Congressional Sub-Committee, p. 207  
*Report of Superintendent of Schools to Bd of Education*, p. 210

*Tennessee:* Ch. 11, 1957, establishment of separate schools, p. 215  
 Ch. 13, 1957, "Pupil Assignment Act," p. 215  
 Ch. 9, 1957, transfer of pupils, p. 220  
 Ch. 12, 1957, operation of joint schools, p. 220  
 Ch. 10, 1957, pupil transportation, p. 222

**Transportation****BUSES**

*Alabama:* Montgomery Bd resolutions, p. 223  
*Florida:* Governor's proclamations, p. 224

**Employment****FAIR EMPLOYMENT LAWS**

*Iowa:* Des Moines Ordinance, p. 225

**Constitutional Law****INTERPOSITION AND NULLIFICATION**

*Tennessee:* House Resolution, p. 228

**ADMINISTRATIVE AGENCIES****Education****PUBLIC SCHOOLS**

*New York:* Zoning Report, p. 231

*Tennessee:* Anderson County Bd resolution, p. 27

**Employment****FAIR EMPLOYMENT LAWS**

*New Jersey:* Thompson v. Erie Railroad Co. (N.J. Dept of Ed), p. 237

**GOVERNMENT EMPLOYEES**

*Federal:* Report of President's Comm., p. 249

**Military Service****SELECTIVE SERVICE SYSTEM**

*Federal Statutes:* Correspondence re Gray, p. 254

**ATTORNEYS GENERAL****Education****COLLEGES AND UNIVERSITIES**

*Louisiana:* Opinion re La. Act No. 15, p. 261

**Governmental Facilities****SCHOOL BUILDINGS**

*Georgia:* Opinion re use of athletic field, p. 268

**REFERENCE SECTION**

**Federal Jurisdiction: A Study of the Authorized Area of Action of United States Courts**, p. 269

**Bibliography, general**, p. 287

**Table of cases, Vol. 2, No. 1**, p. 293

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The *Race Relations Law Reporter* is published six times a year, February, April, June, August, October, and December, by Vanderbilt University School of Law, Nashville 5, Tennessee. Entered as second-class matter February 24, 1956 at the post office at Nashville, Tenn., under the Act of March 3, 1879. Subscription price \$3.00 per year; two years, \$5.00. If purchased separately \$1.00 per regular issue. Printed by Rich Printing Co., 150 10th Ave., N., Nashville, Tennessee.

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# UNITED STATES SUPREME COURT

## TRIAL PROCEDURE Grand Juries—Alabama

William Earl FIKES v. State of ALABAMA

United States Supreme Court, January 14, 1957, No. 53, \_\_\_\_ U.S.\_\_\_\_, 77 S.Ct. 281.

**SUMMARY:** The petitioner had been convicted in an Alabama state court of burglary and attempted rape and sentenced to death. He appealed to the Alabama Supreme Court on the ground, among others, that a systematic exclusion of Negroes from the grand jury which indicted him deprived him of rights secured by the Fourteenth Amendment. The Alabama Supreme Court found no such systematic exclusion of Negroes from the grand jury and affirmed on that as well as other grounds. 81 So.2d 303, 1 Race Rel. L. Rep. 200 (1955). After the United States Supreme Court agreed to hear the case, petitioner asserted that he had been denied due process of law through, among other things, the admission in evidence against him of an involuntary confession and the composition of the grand jury. Without reaching other questions, the Supreme Court reversed, three justices dissenting, on the ground that the confession admitted in evidence against him was obtained involuntarily through prolonged questioning, although without physical violence, and its use was a denial of due process of law. The opinion of the court does not consider any issue of race or color.

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## MISCELLANEOUS ORDERS

### The United States Supreme Court:

Denied certiorari (i.e., declined to review) in the following cases:

*Rawdon v. Jackson* (Prior decision 235 F.2d 93, 1 Race Rel. L. Rep. 655 (5th Cir. 1956) in which a suit asking desegregation of schools in Mansfield, Texas, was remanded to a federal district court with instructions to issue an order requiring a prompt start, "uninfluenced by private and public opinion as to desirability," toward integration.) 352 U.S. 925, 77 S.Ct. 221, No. 451, December 3, 1956.

*Goldsby v. Mississippi* (Prior decision 86 So.2d 27, 1 Race Rel. L. Rep. 565 (Miss. 1956) in which a claim of unconstitutionality based on racial discrimination in the selection of juries was overruled by the Mississippi Supreme Court.) 352 U.S. 944, 77 S.Ct. 266, No. 185 Misc., December 10, 1956.



# COURTS

## EDUCATION

### Public Schools—Delaware

Brenda EVANS et al. v. BOARD OF TRUSTEES OF CLAYTON SCHOOL DISTRICT NO. 119, et al.

United States District Court, District of Delaware, November 9, 1956, Civ. No. 1816.

**SUMMARY:** Eight suits have been filed by Negro school children against state and various county school officials in Delaware in the federal district court in that state. In each of these cases admission is being sought to various schools of the state without regard to race or color. In one case, involving a school in Clayton, Delaware, the school district officials moved to dismiss the action as to them on the grounds that the complaint failed to state a valid cause of action because it failed to allege that no administrative impediments existed to the desegregation of the schools and that the court lacked jurisdiction of the subject matter. The court held that it had jurisdiction under the applicable federal statutes. As to the other contention, the court reviewed the two decisions of the United States Supreme Court in the *School Segregation Cases* and stated that administrative impediments to the opening of public schools on a nondiscriminatory basis were not matters to be alleged by persons seeking admission but, on the contrary, were matters of mitigation which might be shown by school officials in indicating their good faith compliance with the constitutional mandate of the Supreme Court. The motion to dismiss was denied.

WRIGHT, District Judge.

This is a class suit brought pursuant to Rule 23 (a)(3) of the Federal Rules of Civil Procedure.<sup>1</sup> All of the plaintiffs are among those classified as "colored", of Negro blood and ancestry, and are residents of Clayton, Delaware. The defendants are the members of the State Board of Education, the Board of Trustees of Clayton School District No. 119 and the State Superintendent of Public Instruction.

The complaint alleges plaintiffs "... by reason of their residence, except for their race, color and ancestry, would be acceptable by defendants for attendance at the public school in Clayton School District No. 119."<sup>2</sup> The com-

1. "Rule 23. (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

2. Par. 3 of the Complaint.

plaint further charges that in response to a petition addressed to the defendants, as members of the Board of Trustees of the Clayton School District No. 119, "... to take immediate steps to reorganize the public school ... on a racially nondiscriminatory basis and to eliminate racial segregation in said school,"<sup>3</sup> said defendants officially stated they had no plan for desegregation.<sup>4</sup> The failure and refusal of the Board of Trustees of the Clayton School District to reorganize the public school of the school district on a racially nondiscriminatory basis was called to the attention of the defendant members of the State Board of Education, who were requested to immediately desegregate the public school.<sup>5</sup> On March 15, 1956 the defendant members of the State Board of Education, by official action, unanimously refused to comply with the plaintiffs' request to desegregate said public school.<sup>6</sup>

Some of the defendants, namely, the members

3. Par. 5 of the Complaint.

4. Par. 6 of the Complaint.

5. Par. 7 of the Complaint.

6. Par. 8 of the Complaint.

of the Board of Trustees of the Clayton School District No. 119, have moved to dismiss the complaint as to them on the grounds, (1) the complaint fails to state a claim against the defendants upon which relief can be granted, and (2) this court lacks jurisdiction over the subject matter.

The defendants urge the complaint fails to state a claim upon which relief can be granted because there is absent any allegation of the non-existence of administrative impediments to full faith compliance with the constitutional principles set forth by the Supreme Court in the two Brown decisions.<sup>7</sup> Omission of this allegation is fatal, according to defendants, because they read the second Brown decision as conditioning the right of a Negro to attend a public school without regard to racial considerations.

#### [Meaning of Two Brown Decisions]

Defendants misapprehend the meaning of the two Brown decisions. The first Brown decision supplied an unqualified affirmative answer to the question of whether "segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of a minority group of equal educational opportunities."<sup>8</sup> The Supreme Court expressed its holding in the following manner:

". . . we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."<sup>9</sup>

In the second Brown decision, the Supreme Court referred to the first Brown case as a declaration of "the fundamental principle that racial discrimination in public education is unconstitutional."<sup>10</sup> After incorporating the opinion in the first Brown decision by reference into the opinion of the second Brown decision, the Supreme Court indicated the subject matter of the second opinion was to determine "the manner in which the relief is to be ac-

7. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), hereinafter referred to as the first Brown case; *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955), hereinafter referred to as the second Brown decision.

8. 347 U.S. 483 at 493 (1954).

9. *Id* at 495.

10. 349 U.S. 294 at 298 (1955).

corded."<sup>11</sup> Therefore, the second Brown decision cannot be construed as conditioning the constitutional right set forth in the first Brown case. Rather, the second Brown decision must be read as establishing a standard as to what constitutes a good faith implementation of the governing constitutional principles set forth in the first Brown decision. Not only do the constitutional principles set forth in the first Brown decision remain unqualified, but, the defendants also have the burden of advancing reasons justifying delay in carrying out the Supreme Court ruling.<sup>12</sup> It would be illogical to hold plaintiffs' complaint must set forth facts which defendants will have the burden of proving.

#### [Jurisdiction]

The second objection of defendants goes to the jurisdiction of this court over the subject matter of the complaint. Jurisdiction is founded upon 28 U.S.C. §§ 1331 and 1343. 28 U.S.C. § 1331 provides:

"§ 1331. Federal question; amount in controversy.

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930."

The pertinent portion of 28 U.S.C. § 1343 provides:

"§ 1343. Civil rights.

"The district courts shall have original

11. *Ibid.*

12. ". . . the (inferior) courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. *The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.* To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." (Emphasis added) *Brown v. Board of Education of Topeka*, 349 U.S. 294, at 300-301 (1955).

jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

The jurisdiction of this court, invoked under the civil rights jurisdictional statute, 28 U.S.C. § 1343, is questioned by the defendants on the theory that when the Board of Trustees of Clayton School District No. 119 officially stated they had no plan for desegregation they were not acting "under color of any State law". This conclusion is unsound and can only be reached by traveling a tortuous path of conceptualistic reasoning.

#### [Plans for Integration]

The local school boards are a legislative creation of the State of Delaware.<sup>13</sup> The State Board of Education has determined as a matter of general policy (1) "that any steps towards integration must be embodied in a plan to be devised by the local board", and (2), "that any such plan must be submitted to the State Board for consideration and approval."<sup>14</sup> Regulations of the State Board of Education have the force

13. 14 Del. C.

14. Steiner v. Simmons, 111 A. 2d 574 at 582 (Del. 1955).

and effect of law.<sup>15</sup> A plan of integration cannot be formulated by the defendants as individuals. Any action taken by the individual defendants relative to the integration problems of Clayton School District No. 119 is possible only because by virtue of State law they are the duly and legally constituted Board of Trustees of the Clayton School District. Thus the defendants alleged failure to formulate a plan for integration must be considered to be done under color of State law.<sup>16</sup>

Since the court has jurisdiction under 28 U.S.C. § 1343, it is unnecessary to determine whether the court would have jurisdiction under 28 U.S.C. § 1331. Accordingly, that question is left undecided. The defendants' motion to dismiss is denied.

An order in accordance herewith may be submitted.

15. *Id.* at 583.

16. Cf. *Ex Parte Virginia*, 100 U.S. 339 at 347 (1879): "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

In *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 at 246 (1931) it was said: "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law."

Finally, it has been stated, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'" *United States v. Classic*, 313 U.S. 299 at 326 (1941).

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## EDUCATION

### Public Schools—Florida

**Theodore GIBSON, Jr. by his next friend, Theodore Gibson, et al. v. BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, Florida, a corporation, et al.**

United States District Court, Southern District, Florida, November 29, 1956, No. 6978-M-Civil.

**SUMMARY:** Negro school children in Miami, Dade County, Florida, brought an action for a declaratory judgment in federal district court seeking a declaration of their right to attend public schools in that county without discrimination as to race or color. The defendant Board of Public Instruction moved to dismiss the action. After a hearing on that motion, the court dismissed the action without prejudice. The court stated that, because there had been no demand on or refusal by the board to admit the plaintiff Negroes to any public school, no actual case or controversy existed so as to form the basis of a declaratory

**judgment and that it would not be presumed that the board would act contrary to their oath taken to support and defend the Constitution of the United States.**

#### ORDER DISMISSING CAUSE WITHOUT PREJUDICE

CHOATE, District Judge.

This cause having come on to be heard on the 18th day of November, 1956, upon the Defendants' Motion To Dismiss, and Alternative Motion To Strike, filed on October 3, 1956, and the Court having heard argument of counsel and having granted counsel leave to file memoranda with the Court subsequent to the hearing, which memoranda have been submitted and considered, the Court is of the opinion that this cause should be dismissed without prejudice for the following reasons.

Section 2201 of Title 28, United States Code, empowers this Court to declare the rights and other legal relations of any interested party seeking such declaration *in a case of actual controversy*. That this Court has jurisdiction to entertain such a declaratory judgment suit *properly presented* under the Civil Rights Statutes, 42 U.S.C. §§1981 et seq., is unquestionable. *Bruce v. Stilwell*, 206 F. 2d 554 (5th Cir. 1953). But this Court, being a court of law, can proceed *only* in accordance with the well-defined dictates of the statute and common law applicable to the proceeding at bar.

Declaratory judgments can be rendered only in cases of *actual controversy*, and this Court is not empowered to render any advisory opinions. Nor can this Court declare the rights and other legal relations of individuals based upon an hypothetical state of facts. In the case of *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), the United States Supreme Court stated at page 461:

The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . This Court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied.

See also *Public Service Comm. of Utah v. Wy-*

*coff Co.*, 344 U.S. 237 (1952) and *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947).

The Plaintiff Negro school children seek in this suit a declaration of their rights to attend a nonsegregated school in Dade County, Florida. Nowhere in their Amended Petition appears any allegations that the Defendant school board denied the Plaintiffs admittance to such a school nor do the Plaintiffs allege that they ever applied for such admission. The Plaintiffs merely state in Paragraph 3: "Each of the infant plaintiffs seeks admission to the public schools of Dade County, Florida without racial segregation."

Time-honored in the law is the maxim that "from the *facts* the law arises." Without a factual situation upon which this Court can act, this Court does not have the power to proceed. The Plaintiffs allege that they are not attending integrated schools but they nowhere allege that they have ever sought admission to such schools and were denied admission by the Defendants in violation of the plaintiffs' Constitutional rights. The absence of this essential element of the Plaintiffs' alleged cause of action divests this Court of the power to proceed further in this proceeding.

Nor can it be said that the August 15, 1955, statement of policy contained in Paragraph 5 is sufficient to vest this Court with jurisdiction. Before this Court can proceed under 42 U.S.C. §§1981 et seq., and 28 U.S.C. §2201, there must have been *in fact* some deprivation of Plaintiffs' Constitutional and legal rights, privileges, or immunities. The alleged statement of policy may be characterized as a *threat* to deprive the Plaintiffs of their rights but it does not constitute a deprivation as a matter of law. Whether or not the Defendants will follow the decision of the United States Supreme Court in the case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), can not yet be determined. But this Court believes that the oath taken by each member of the Defendant Board pursuant to Section 876.05. Florida Statutes, 1955, to "support the Constitution of the United States and of the State of Florida" was not lightly sworn to by the Defendants when they took office.

The Supreme Court clearly defined the function of the District Court in the *Brown* decision

at 349 U.S. 294, 300 (1955), as a Court of law (when the school authorities propose a plan as part of litigation) to oversee the integration of the public schools and to strike down segregation where it is shown to exist after first giving due consideration to the time and other elements confronting the school authorities. It is not for the Courts to make the policy of the school boards but to "consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." (Brown decision at 349 U.S. 301.)

There is presently no act of the Defendants constituting any deprivation of any of the Plaintiffs' rights before this Court nor has there been

any desegregation plan submitted by the defendants for this Court's consideration. Only upon the presentation of a justiciable cause can an adjudication of the relative rights of parties be made by this Court. Until the presentation of such a cause, this suit must stand dismissed without prejudice to the Plaintiffs. It is, therefore,

ORDERED AND ADJUDGED that the cause herein be and the same is hereby dismissed without prejudice.

DONE AND ORDERED in chambers at Miami, Florida, this 29th day of November, 1956.

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## EDUCATION Public Schools—Maryland

Stephen MOORE, Jr., a minor by Stephen Moore, Sr., his father and next friend, et al. v.  
BOARD OF EDUCATION OF HARFORD COUNTY et al.

United States District Court, District of Maryland, November 23, 1956, 146 F.Supp. 91.

**SUMMARY:** In June, 1955, the Board of Education of Harford County, Maryland, took action to begin a study, through a Citizens Committee, to consider problems involved in initiating a policy of admission of children to county schools without regard to race. In November, 1955, a suit was filed in the federal district court of Maryland on behalf of twenty-one Negro school children to require the immediate desegregation of the schools. In February, 1956, the Citizens Committee made its report (1 Race Rel. L. Rep. 604) recommending the admission of children to county schools regardless of race (upon application to the Board if a transfer was involved) beginning in September, 1956. The Board adopted this recommendation. Thereafter the original desegregation suit was dismissed by consent on stipulation of the parties. Four of the plaintiffs involved in the original suit later applied for transfers to previously "white" schools and the applications were denied by the Board. Without pursuing other administrative remedies, the four applicants filed the present action in federal district court seeking their immediate admission to the schools. Referring to the rule adopted previously in *Robinson v. Board of Education of St. Mary's County*, 143 F. Supp. 481, 1 Race Rel. L. Rep. 862 (D. C. Md. 1956), the court declined to consider the case on its merits until the plaintiffs had exhausted the administrative remedies available to them under Maryland statutes.

THOMSEN, Chief Judge.

This action, brought by four Negro children seeking admission to certain public schools in Harford County, Maryland, presents: (1) the usual questions under Brown v. Board of Education, 347 U.S. 483, 349 U.S. 294; (2) the same questions of law which were raised by the defendants in *Robinson v. Board of Education*, (D. Md.) 143 F. Supp. 481; and (3) a problem

of equitable estoppel arising out of a previous action brought by the plaintiffs herein and others against the defendants herein, which was dismissed by the plaintiffs in reliance upon a resolution adopted by the defendants, the Board of Education of Harford County.

### FACTS

Harford County is predominantly rural, but in the southern portion of the county there are

two large government reservations, the Aberdeen Proving Ground at Aberdeen, and the Army Chemical Center at Edgewood. On these reservations there are non-segregated housing developments.

There are approximately 12,600 white students and 1,400 Negro students in the public schools of Harford County. The defendant Board of Education operates a 6-3-3 system; that is, 6 years of elementary school, 3 years of junior high and 3 years of senior high. The white high schools, at Bel Air, Bush's Corner (North Harford), Edgewood, Aberdeen, and Havre de Grace, are combination junior-senior high schools; the colored schools, at Hickory and Havre de Grace, are "consolidated schools", comprising elementary, junior high and senior high classes.

#### [Appointment of Committee]

On June 30, 1955, just one month after the second opinion in *Brown v. Board of Education*, the Board of Education of Harford County selected a Citizens Consultant Committee of thirty-six members from all sections of the county, five of whom were Negroes, to consider the problem of desegregation of the public schools in Harford County and to make recommendations to the Board of Education.

On July 27, 1955, a group of Negro parents petitioned the Board of Education, calling upon them "to take immediate steps to reorganize the public schools under your jurisdiction on a non-discriminatory basis".

The Citizens Consultant Committee held its first meeting on August 15, 1955, and was split up into a number of sub-committees, to consider facilities, transportation and social relationships respectively. A member of the staff of the Board of Education served as consultant to each sub-committee. The sub-committees met at various times during the rest of the year 1955 and the first two months of 1956.

#### [First Suit Filed]

On November 29, 1955, the four infant plaintiffs in the instant case, together with seventeen other Negro children, through their parents and next friends, brought suit in this court against the defendants herein (Civil Action No. 8615), alleging that the Board had "refused to desegregate the schools within its juris-

diction and has not devised a plan for such desegregation", and praying that:

"1. The Court advance this cause on the docket and order a speedy hearing of the application for preliminary injunction and the application for permanent injunction according to law and that upon such hearings:

"2. The Court enter preliminary and permanent judgments that any orders, customs, practices, and usages pursuant to which said plaintiffs are segregated in their schooling because of race, violate the Fourteenth Amendment to the United States Constitution.

"3. The Court issue preliminary injunctions ordering the defendants to promptly present a plan of desegregation to this Court which will expeditiously desegregate the schools in Harford County and forever restrain and enjoin the defendants and each of them from thereafter requiring these plaintiffs and all other Negroes of public school age to attend or not to attend public schools in Harford County because of race.

"The Court allow plaintiffs their costs and such other relief as may appear to the Court to be just."

#### [Report of Committee]

On February 27, 1956, the Citizens Consultant Committee held a meeting, at which all of the sub-committees presented their final reports, and the full committee unanimously adopted the following resolution:

"To recommend to the Board of Education for Harford County that any child regardless of race may make individual application to the Board of Education to be admitted to a school other than the one attended by such child, and the admissions to be granted by the Board of Education in accordance with such rules and regulations as it may adopt and in accordance with the available facilities in such schools; effective for the school year beginning September, 1956."

On March 7, 1956, the Board of Education of Harford County adopted the resolution as submitted by the Citizens Consultant Committee.

**[Hearing of First Case]**

On March 9, 1956, Civil Action No. 8615 came on for hearing before me on defendants' motion to dismiss the complaint, pursuant to Rule 12 (b). At the beginning of the hearing, counsel for defendants advised the court that the Board of Education of Harford County had "approved or adopted" the recommendation offered by the Citizens Consultant Committee and read the resolution into the record. He then said: "Since that plan embraces the relief prayed for, I think that takes care of that, and I want to call that to Your Honor's attention." Counsel for plaintiffs then said: "We are in a position to enter into a consent decree embodying the terms of this resolution. We would like to discuss it, but I do not think there is any need for further litigation." Counsel for the defendants replied: "I do not think that the Court should enter a consent decree when the relief prayed for is the policy adopted by the Board. I think the complaint should be dismissed in open court because there is really nothing before the Court to effectuate." I then left the bench so that counsel could discuss the matter more freely. When court reconvened the following colloquy took place:

"Mr. Greenberg: We discussed this resolution that has been adopted by the School Board and we have told counsel for the defendants that we are sure they are proceeding in good faith and this plan is acceptable to us, and we will dismiss our suit and make that a matter of record in open court, and file this.

"Mr. Barnes: That's agreeable to the defendants, Your Honor.

"The Court: I think it would be well to have the record show that in view of the fact that you have been presented with this you offered to dismiss the suit, and attach this paper as an exhibit.

"Mr. Greenberg: Yes, sir.

"The Court: I am very happy this has worked out in a very satisfactory way."

The following stipulation, signed by counsel for all parties, was filed in the case on the same day:

**"DISMISSAL OF ACTION"**

"1. This cause came to be heard in this Court on motion to dismiss the 9th day of March, 1956.

"2. Defendants, by their counsel, presented to the Court the attached Resolution of Harford County Citizens Consultant Committee, adopted by the Harford County Board of Education, as submitted, at its regular meeting on March 7, 1956.

"3. Relying upon said resolution, as adopted, plaintiffs hereby withdraw their complaint, and pray that the same be dismissed, costs to be paid by plaintiffs."

To this stipulation was attached a certified copy of the resolution recommended by the Citizens Consultant Committee and adopted by the Harford County Board of Education.

**[Transfer Policy Adopted]**

On June 6, 1956, the Board of Education adopted the following "Transfer Policy", which all parties agree was reasonable:

"If a child desires to attend a school other than the one in which he is enrolled or registered, it will be necessary for his parents to request a transfer. Applications for transfer are available on request. These requests should be addressed to the Board of Education, c/o Superintendent of Schools, Bel Air, Maryland. Applications will be received by the Board of Education between June 15 and July 15, 1956. All applications for transfer must state the reason for the request, and must be approved by the principal of the school which the pupil is now attending.

"Applications for transfer will be handled through the usual and normal channels now operating under the jurisdiction of the Board of Education and its executive officer, the Superintendent of Schools.

"While the Board has no intentions of compelling a pupil to attend a specific school or of denying him the privilege of transferring to another school, the Board reserves the right during the period of transition to delay or deny the admission of a pupil to any school, if it deems such action wise and necessary for any good and sufficient reason.

"All applications for transfer, with recommendations of the Superintendent of Schools, will be submitted to the Board of Education for final consideration at the regular meeting of the Board on Wednes-

day, August 1, 1956. When requests for transfer are approved, parents must enroll their child at the school on the regular summer registration date, Friday, August 24, 1956."

The transfer policy was advertised in all newspapers published in Harford County. Sixty applications for transfer of Negro pupils were submitted within the time specified.

#### [Desegregation Policy]

On August 1, 1956, the Board of Education of Harford County adopted a "Desegregation Policy", embodied in a document which recited the appointment of the Citizens Consultant Committee, the recommendation made by that Committee, the resolution adopted by the Board of Education on March 7, 1956, and the transfer policy adopted by the Board in June. The statement of Desegregation Policy continued as follows:

"The Supreme Court decision, which required desegregation of public schools, provided for an orderly, gradual transition based on the solution of varied local school problems. The resolution of the Harford County Citizens Consultant Committee is in accord with this principle. The report of this committee leaves the establishment of policies based on the assessing of local conditions of housing, transportation, personnel, educational standards, and social relationship to the discretion of the Board of Education.

"The first concern of the Board of Education must always be that of providing the best possible school system for all of the children of Harford County. Several studies made in areas where complete desegregation has been practiced have indicated a lowering of school standards that is detrimental to all children. Experience in other areas has also shown that bitter local opposition to desegregation in a school system not only prevents an orderly transition, but also adversely affects the whole educational program.

"With these factors in mind, the Harford County Board of Education has adopted a policy for a gradual, but orderly, program for desegregation of the schools of Harford County. The Board has approved applica-

tions for the transfer of Negro pupils from colored to white schools in the first three grades in the Edgewood Elementary School and the Halls Cross Roads Elementary School. Children living in these areas are already living in integrated housing, and the adjustments will not be so great as in the rural areas of the county where such relationships do not exist. With the exception of two small schools, these are the only elementary buildings in which space is available for additional pupils at the present time.

"Social problems posed by the desegregation of schools must be given careful consideration. These can be solved with the least emotionalism when younger children are involved. The future rate of expansion of this program depends upon the success of these initial steps."

Pursuant to the Desegregation Policy so adopted, fifteen of the sixty applications were granted, and forty-five, including those of the infant plaintiffs in the instant case, were refused. On August 7, 1956, the defendant Charles W. Willis, Superintendent of Schools, sent the following letter to the parents of each of the infant plaintiffs:

"The Board of Education, at its regular August meeting, adopted a policy for the desegregation of Harford County schools. Under the provisions of this policy your child will not be allowed to transfer from his present school. Your request for a transfer has been refused by the Board of Education.

"A copy of the desegregation policy is enclosed."

Neither the infant plaintiffs nor their parents appealed to the State Board of Education from the action of the County Superintendent denying their requests for transfer. Nor have any appeals been filed by or on behalf of any of the other Negro children whose requests for transfer were refused.

#### [Second Suit Filed]

On August 28, 1956, the four infant plaintiffs by their parents and next friends filed the instant suit, pursuant to Rule 23 (a) (3), "for themselves and on behalf of all other Negroes similarly situated", alleging "most of the facts set out above and other facts, some of which

are disputed, which need not be detailed at this time.

Infant plaintiff Moore seeks transfer from the Central Consolidated Elementary School in Hickory to the elementary school in Bel Air, where he resides; Spriggs seeks transfer from the school in Hickory to the High School (junior high) in Edgewood, where he resides; Slade and Garland seek transfer from the Havre de Grace Consolidated School to the Aberdeen High School (9th and 11th grades respectively).

They pray that:

"1. The Court advance this cause on the docket and order a speedy hearing of the application for preliminary injunction and application for permanent injunction according to law and that upon such hearing;

"2. The Court enter preliminary and permanent judgments, that any orders, customs, practices and usages pursuant to which said plaintiffs are each of them, their lessees, agents and successors in office from denying to plaintiffs and other Negro residents of Harford County of the State of Maryland admission to any Public School operated and maintained by the Board of Education of Harford County, on account of race and color."

Defendants filed a motion to dismiss the complaint pursuant to Rule 12 (b), raising substantially the same points which were considered in *Robinson v. Board of Education of St. Mary's County*, *supra*. I overruled that motion on October 5, 1956. Defendants filed their answer on October 24, and the case was set for hearing on November 14. Both sides offered testimony and documentary evidence. From the testimony it appears that most, but not all of the schools in Harford County are overcrowded if the "standards" or "goals" set out by the State are considered, namely, an average of 30 per class in elementary schools and 25 per class in secondary schools. But defendants conceded that any white children moving into the county would be admitted to the appropriate white school, however crowded. The factors considered by the Board of Education in adopting the August 1 Desegregation Policy were discussed at some length. The President of the Board of Education and the County Superintendent testified that they did not consult counsel before adopting the August 1 Desegregation Policy, but that they

thought this policy was in accord with the recommendation of the Citizens Consultant Committee and with the March 7 resolution adopted by the Board.

Plaintiffs' counsel do not charge bad faith against either the Board or the Superintendent, but contend that:

"I. The Harford County School Board Resolution of March 7, 1956, meant that from the following school year and thereafter there would be no legally compelled racial segregation of school children in Harford County;

"II. The defendants are estopped from any further delay in complete integration by their action in causing plaintiffs to withdraw plaintiffs' original suit in reliance on the Board's resolution, which resolution was expressly incorporated by reference into court's order of dismissal;

"III. Plaintiffs are entitled to judicial rather than administrative relief at this time in view of the history and facts of this case;

"A. Defendants, by their actions, are estopped from asserting the doctrine of administrative exhaustion as a defense;

"B. Even if defendants were not estopped from raising the defense of the doctrine of administrative exhaustion, the defense would nevertheless fail as the doctrine is not here applicable;

"IV. Even if defendants could validly raise the questions of necessary administrative delay, their own actions clearly demonstrate the fact that no additional time is needed to solve administrative problems;

"A. Defendants are administratively ready to effectuate desegregation;

"B. 'Community unreadiness' constitutes no legal justification for continued segregation."

## DISCUSSION

The Maryland statutes and decisions were analyzed in *Robinson v. Board of Education of St. Mary's County*, *supra*, pp. 487-491. I adhere to that analysis, and it need not be repeated here. It is clear that some of the factors considered by defendants in the instant case when they adopted the August 1 Desegregation Policy, and some of the points argued by counsel for plaintiffs in opposition thereto, involved administrative problems, over which the State

Board of Education has jurisdiction, and which should be appealed to that Board under the Maryland authorities. Some of the other factors and points involve legal questions, which under Maryland law are for the courts. Most, if not all, involve both administrative and legal problems. Even the estoppel point is a mixed question, because the March 7 resolution leaves open at least the question of available facilities, whatever other matters may have been foreclosed.

Whether the court should attempt to segregate the legal questions and decide them at this time, or should defer any decision until the State Board has been given an opportunity to pass on the problem as an integrated whole, is a matter of comity and discretion. Since, at the time of the hearing in the St. Mary's County case, the State Board assured the court that it will give prompt attention to any appeal filed by or on behalf of Negro students, I am satisfied that I should not make a final decision in this case until the plaintiffs have appealed to the State Board from the action of the County Superintendent denying their applications for transfer. *Brown v. Board of Education*, 349 U.S. 294; *Hood v. Board of Trustees of Sumter County School District No. 2*, (4 Cir.) 232 F.2d 626; *Carson v. Board of Education of McDowell County*, (4 Cir.) 227 F.2d 789; *Robinson v. Board of Education of St. Mary's County*, (D.Md.) 143 F.Supp. 481. However, the final decision in this court, if one is necessary after

the State Board has acted, should be rendered within such time that the losing parties may have an appeal heard by the Court of Appeals for the Fourth Circuit at its June, 1957 term.

### CONCLUSIONS

1. The appointment of the Citizens Consultant Committee in the summer of 1955, its study, resulting in its recommendation to the Board of Education, and the resolution adopted by the board on March 7, 1956, were a prompt and reasonable start toward compliance with the Supreme Court ruling.

2. I intimate no opinion at this time with respect to the sufficiency or propriety of the Desegregation Policy adopted by the Board on August 1, 1956.

3. I will enter a decree dismissing this action unless the plaintiffs appeal to the State Board of Education on or before December 15, 1956, from the action of the County Superintendent refusing their applications for transfer. If plaintiffs enter such an appeal, I will stay further proceedings in this case until the State Board shall have decided the appeal or shall have delayed decision for an unreasonable time; provided that after the State Board shall have rendered its decision, or after March 1, 1957, whichever is earlier, either plaintiffs or defendants may request the court to set this case for further argument and prompt decision.

## EDUCATION

### Public Schools—North Carolina

**Lionel C. CARSON et al. v. Honorable Wilson WARLICK, United States District Judge for the Western District of North Carolina.**

United States Court of Appeals, Fourth Circuit, November 14, 1956, 238 F.2d 724.

**SUMMARY:** In an action filed in federal district court prior to the decision of the United States Supreme Court in the *School Segregation Cases*, Negro school children in the Old Fort, McDowell County, North Carolina, school district sought to require county school officials to furnish equal educational facilities. The plaintiffs also asked for general injunctive relief and a declaratory judgment as to their right to attend the county schools without discrimination based on race or color. The district court dismissed the action after the decision in the *School Segregation Cases* on the ground that the relief sought was now inappropriate. On appeal the United States Court of Appeals for the Fourth Circuit reversed and remanded. *Carson v. Board of Education of McDowell County*, 227 F.2d 789, 1 Race Rel. L. Rep. 70 (1955). The Court of Appeals directed the district court, on rehearing the case, to give consideration to the recently enacted North Carolina "School Placement Law"

(1 Race Rel. L. Rep. 240) providing for administrative and judicial remedies in school placement disputes. An action was subsequently brought in a North Carolina state court, involving some of the plaintiffs in the *Carson* case, seeking admission of Negro pupils to McDowell County schools without regard to race or color. That court sustained a demurrer to the complaint on the grounds, among others, that more than one pupil was involved in the application, contrary to the provisions of the placement law. *Joyner v. McDowell County Board of Education*, 1 Race Rel. L. Rep. 515 (N. C. Super. Ct. 1956). On appeal of that case the North Carolina Supreme Court affirmed the judgment of the lower court on the ground that under the "School Placement Act" the application of each child stood on an individual basis, hence there was a misjoinder of parties. 92 S.E.2d 795, 1 Race Rel. L. Rep. 646 (1956). Thereafter the plaintiffs moved in the federal district court, where the original case was pending on remand, to file a supplemental complaint in which they again sought injunctive relief and a declaratory judgment as to their right to attend the county schools, without asserting their compliance with the state act. The federal district court refused to allow the filing of that complaint until the plaintiffs or some of them had exhausted their administrative remedies under the statute. Thereupon the plaintiffs applied to the United States Court of Appeals for the Fourth Circuit for a writ of mandamus to require the district court to vacate the order staying proceedings in the case, to allow the plaintiffs to file the supplemental pleading and to proceed with the case "as though the Pupil Enrollment Act had never been enacted." This the Court of Appeals refused to do. The court again held that the exhaustion by the plaintiffs of the state administrative (as distinguished from judicial) remedies afforded by the placement act was a necessary prerequisite to securing federal court action on their cases. The court stated that that act was not unconstitutional on its face and that it would not be assumed that it would be administered in an unconstitutional manner. Furthermore the limitation in the act as to the number of parties joining in an action seeking admission to public schools would not, of course, be controlling as to class actions in federal court.

Before PARKER, Chief Judge, SOBELOFF, Circuit Judge, and BRYAN, District Judge.

PARKER, Chief Judge.

This is an application for a writ of mandamus in the case wherein Negro children of Old Fort in McDowell County, North Carolina, allege that the Board of Education of that county is exercising discrimination on the grounds of race in refusing to admit them to schools maintained in the town of Old Fort. When the case was before us on appeal, we held that the court be-

low erred in dismissing the case as moot, but ruled that, in further proceedings therein, the court below should give consideration to whether administrative remedies provided by the North Carolina statute of March 30, 1955,\*

the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education. (1955, c.366, s.1.)

Sec. 115-177. Authority to be exercised for efficient administration of schools, etc.; rules and regulations.—In the exercise of the authority conferred by sec. 115-176 upon the county or city boards of education, each such board shall provide for the enrollment of pupils in the respective public schools located within such county or city administrative unit so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils. In the exercise of such authority such board may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such purposes. (1955, c.366, s.2.)

Sec. 115-178. Hearing before board upon denial of application for enrollment.—The parent or guardian of any child, or the person standing in loco parentis to any child, who shall apply to the appropriate public school official for the enrollment of any such child in or the admission of such child to any public school within the county or city ad-

\* See General Statutes of North Carolina as follows:  
Sec. 115-176. County and city boards authorized to provide for enrollment of pupils.—The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for admission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this article, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than

had been exhausted. *Carson v. Board of Education of McDowell County*, 4 Cir. 227 F.2d 789. After our decision, the Supreme Court of North Carolina, in an action to which two of the applicants here were parties, rendered a decision on May 23, 1956, construing the act of March 30, 1955 (*Joyner v. McDowell County Board of Education*, 244 N.C. 164, 92 S.E.2d 795) in which it said:

"With respect to the provisions of G.S. sec. 115-178, this Court construes them to authorize the parent to apply to the appropriate public school official for the enrollment of his child or children by name in any public school within the county or city administrative unit in which such child

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ministrative unit in which such child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school. (1955, c.366, s.3.)

**Sec. 115-179.** Appeal from decision of board.—Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

or children reside. But such parent is not authorized to apply for admission of any child or children other than its own unless he is the guardian of such child or children or stands in loco parentis to such child or children. In the event a parent, guardian or one standing in loco parentis of several children should apply for their admission to a particular school, it is quite possible that by reason of the difference in the ages of the children, the grades previously completed, the teacher load in the grades involved, etc., the school official might admit one or more of the children, and reject the others. The factors involved necessitate the consideration of the application of any child or children individually and not en masse. Any interested parent, guardian or person standing in loco parentis to such child or children, whose application may be rejected, may appeal to the appropriate board for a hearing in accordance with the rules and regulations established by such board. Furthermore, if the board denies the application for admission of such child or children, the aggrieved party may appeal in the manner prescribed by statute, G.S. sec. 115-179, to the superior court, where the matter shall be heard de novo before a jury in the same manner as civil actions are tried therein.

"Therefore, this Court holds that an appeal to the superior court from the denial of an application made by any parent, guardian or person standing in loco parentis to any child or children for the admission of such child or children to a particular school, must be prosecuted in behalf of the child or children by the interested parent, guardian or person standing in loco parentis to such child or children respectively and not collectively.

\* \* \* \* \*

"An additional reason why this proceeding was properly dismissed is that while it purports to have been brought pursuant to the provisions of our school enrollment statutes, it is not based on an application for assignment relating to named individuals as contemplated by the enrollment statutes, but is in reality a class suit. It is in effect an application for mandamus, requiring the immediate integration of all Negro pupils residing in the administrative unit in which

the Old Fort school is located, in the Old Fort school. Such a procedure is neither contemplated nor authorized by statute. Therefore, the appeal is dismissed."

[*No Compliance with Act*]

The applicants did not attempt to comply with the provisions of the statute as so interpreted by the Supreme Court of North Carolina, but on July 11, 1956, counsel who are representing them before this court wrote a letter to the secretary of the Board of Education, inquiring what steps were being taken for the admission of Negro children to the Old Fort school. The secretary replied that "inasmuch as no Negro pupil has made application, nor has any parent or person standing in loco parentis made application for any Negro child to attend school in the town of Old Fort for the school year 1956-57, the Board had had no cause to take any action in this connection."

Upon receiving this reply, applicants here, plaintiffs in the court below, on the 12th day of July 1956 moved in the action there pending to file a supplemental complaint in which, without alleging compliance with the requirements of the North Carolina statute as interpreted by the Supreme Court, they asked a declaratory judgment and injunctive relief with respect to their right to attend the Old Fort school. The District Judge denied the motion on the ground that plaintiffs had not exhausted their administrative remedies and stayed proceedings in the cause until same should be exhausted, but stated that, as soon as it was made to appear that they had been exhausted, he would grant such relief as might be appropriate in the premises, saying:

"(1) That obedient to the per curiam decision of the Court of Appeals for the Fourth Circuit, 227 F.2nd 789, this Court has up until this time and will consistently hereafter consider this case in the light of the decision of the Supreme Court of the United States in the so-called School Segregation Case, and of the North Carolina statute chapter 366 Laws 1955, G.S. 115, 176-179, set out in the opinion in the 227 Fed. Reporter 2d 789, and has consistently asserted and now reaffirms that it is the duty under the authority granted to stay all proceedings herein and to cause the matter to remain continuously at issue on the

docket until it should be made to appear that the plaintiffs herein or some of them have exhausted the administrative remedies which are provided for them or some of them or any of them under the above statute, and that when such is made to appear the Court will immediately entertain a motion by counsel for the plaintiffs or some of them or any of them to file amendment to the complaint or to replead, indicating that the rights to which they are entitled have been denied them on account of their race or color, and immediately thereafter, and within twenty days, will require an answer to be filed thereto and will set the case down with a peremptory setting as the first cause to be disposed of, either at the regular term or some other called term of this court, dependent upon the requests of the parties or those who appear for them as counsel in said cause."

Upon the denial of the motion, application for writ of mandamus was filed here to require the District Judge to vacate the order staying proceedings, to allow the supplemental pleading to be filed and to proceed with the cause "as though the Pupil Enrollment Act had never been enacted."

[*Administrative Remedies Not Exhausted*]

We think it clear that applicants are not entitled to the writ of mandamus which they ask, for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are now entitled to the relief which they seek in the court below until these administrative remedies have been exhausted. (See 227 F.2d at 790). In the supplemental complaint which they proposed to file in the court below they did, indeed, allege that on August 24, 1955, they had presented their children at the Old Fort school for admission, that they were denied admission on the ground of race and that on August 27 they and certain other Negroes had filed a joint petition with the school board asking that their children be admitted to the school. This petition was denied by the Board in January 1956 and it was an appeal from this order of the Board to the Superior Court and thence to the Supreme Court of the State in which the decision of the Supreme Court of May 23, 1956 was rendered. While the presen-

tation of the children at the Old Fort school appears to have been sufficient as the first step in the administrative procedure provided by statute, the prosecution of a joint or class proceeding before the school board was not sufficient under the North Carolina statute as the Supreme Court of North Carolina pointed out in its opinion; and not until the administrative procedure before the board had been followed in accordance with the interpretation placed upon the statute by that court would applicants be in position to say that administrative remedies had been exhausted.

[*Constitutionality of Act*]

It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy which it provides has not been invoked. It is argued that it is unconstitutional on its face in that it vests discretion in an administrative body without prescribing adequate standards for the exercise of the discretion. The standards are set forth in the second section of that act, G.S. 115-177, and require the enrollment to be made "so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils enrolled, and the health, safety and general welfare of such pupils". Surely the standards thus prescribed are not on their face insufficient to sustain the exercise of the administrative power conferred. As said in *Opp Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 145: "The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective." The authority given the boards "is of a fact finding and administrative nature, and hence is lawfully conferred." *Sproles v. Binford*, 286 U.S. 374, 397. See also *Douglas v. Noble*, 261 U.S. 165, 169-170; *Holt v. Geiger Jones Co.*, 242 U.S. 539, 553-554; *Mutual Film Corp. v. Hodges*, 236 U.S. 248; *Mutual Film Corp. v. Ohio Industrial Com'n*, 236 U.S. 230,

245-246; *Red "C" Oil Mfg. Co. v. North Carolina*, 222 U.S. 380, 394.

Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown et al. v. Board of Education*, et al. 349 U.S. 294, 299:

"School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles".

[*No Exhaustion of Judicial Remedies*]

It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. *Lane v. Wilson*, 307 U.S. 268, 274. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending. Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

There is no question as to the right of these school children to be admitted to the schools

of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. *Henderson v. United States*, 339 U.S. 816, 824. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United

States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required. We are dealing here, of course, with the administrative procedure of the state and not with the right of persons who have exhausted administrative remedies to maintain class actions in the federal courts in behalf of themselves and others qualified to maintain such actions.

Mandamus Denied.

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## EDUCATION Public Schools—Tennessee

**Robert W. KELLEY et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE et al.**

United States District Court, Middle District, Tennessee, January 21, 1957, Civil No. 2094.

**SUMMARY:** White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking to require the city board of education to admit children to public schools in the city without regard to race or color. A motion to constitute a three-judge court was granted. The court determined that it did not have jurisdiction, the invalidity of Tennessee constitutional and statutory provisions requiring racially separate schools being conceded by the defendants, and remanded the case to a single judge court. The court further found that the board of education was proceeding in good faith toward eliminating segregation in the schools and granted a continuance to the next term of court. 139 F.Supp. 578, 1 Race Rel. L. Rep. 519 (1956). Later a motion to intervene in the case by members of the Tennessee Federation for Constitutional Government was denied by the court. 1 Race Rel. L. Rep. 1042 (1956). On October 29, 1956, the board of education adopted a plan providing for the elimination of compulsory segregation in the first grade beginning with the 1957-58 school year with a limited right of transfer on the basis of the racial composition of the school attended and setting a date for further consideration of the time and extent of additional integration. 1 Race Rel. L. Rep. 1120. This plan was submitted to the court on further hearing of the action for an injunction. The court approved the plan in part as being a prompt and reasonable start toward complete integration but directed the board to submit, before December 31, 1957, "a report setting forth a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor."

MILLER, District Judge.

On May 31, 1955, the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, 99 L.Ed. 1083, enunciated the principles which should govern the district courts in formulating decrees to implement its prior ruling in the same case that racial discrimination in public education is unconstitutional.

Immediately thereafter, the board of education of the city of Nashville began an intensive study to determine the methods to be followed in the city school system to effectuate the constitutional principles declared by the Supreme Court. These studies included investigation of the programs of other cities in the matter of desegregation, an analysis and review of per-

tinent books and periodicals, attendance by its representatives at work shops and other group meetings, and the exchange of views between its members and others invited to meet with its committee.

*[Board Acted in Good Faith]*

From the outset the board of education frankly and openly recognized its obligation to maintain the school system upon a racially non-discriminatory basis. It has endeavored by its careful investigation and study of the question to find a solution which would accomplish the transition as soon as reasonably practicable consistent with the public interest and the efficient operation of the schools.

The problem confronting the board of education was not one which was concerned with a single school but with an entire school system which had been maintained for practically a hundred years—always on a segregated basis—and having an aggregate school population of 27,000 students, of whom 10,000 were Negro students. In this situation the board concluded that it would need more time to formulate a workable plan of integration.

In recognition of the reasonableness of this request for further time, a three-judge court, at the March 1956 term, granted the board's motion for a continuance of the case to the October 1956 term. In granting the continuance the court specifically found that the board of education at an early date had announced that it would comply with the ruling of the Supreme Court in integrating the public schools of Nashville, and that it "has proceeded promptly to take steps toward that end, and is now acting in good faith and with appropriate dispatch in awaiting the taking of the school census and giving careful consideration to all factors involved, so as to arrive at a workable plan of integration, which appears to be a reasonable start toward full compliance with the May 17, 1954 ruling of the Supreme Court."

*[Plan Submitted]*

At the October 1956 term the case was called and set for trial Nov. 13, 1956. At the hearing which was begun on that date, the board of education submitted its plan, adopted on Oct. 29, 1956. The primary question presently before the court is whether the plan so adopted is adequate to meet constitutional requirements.

The pertinent provisions of the plan are as follows:

1. Compulsory segregation based upon race is abolished in grade one of the elementary schools of the city of Nashville for the scholastic year beginning in September, 1957.
2. A plan of school zoning or districting based upon location of school buildings and the latest scholastic census without reference to race will be established for the administration of the first grade and of other grades as hereafter desegregated.
3. Every student entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may be necessary in particular instances.
4. Applications for transfer of first grade students from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents or guardians when good cause therefore is shown and when transfer is practicable, consistent with sound school administration.
5. The following will be regarded as some of the valid conditions to support application for transfer:
  - (a) When a white student would otherwise be required to attend a school previously serving colored students only.
  - (b) When a colored student would otherwise be required to attend a school previously serving white students only.
  - (c) When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race.
6. The Instruction committee is directed to continue its study of the problem and to recommend by Dec. 31, 1957, the time of and the number of grades to be included in the next step to be taken in further abolishing compulsory segregation.

It is the considered opinion of the school authorities, after mature deliberation, that the change from a system of segregated schools

should be upon a gradual or step-by-step basis. They have concluded that an abrupt change in all of the city schools would be inconsistent with the public interest and with the efficient functioning of the school system itself. They believe that the soundest approach to the problem is to begin with desegregation in the first grade and to make plans for the future based upon the experience thus gained.

Whether the solution proposed by the board is the best one which could be devised is a matter of dispute in the evidence. The views of the school authorities are supported by the testimony of expert witnesses. Other experts, testifying for the plaintiffs, have expressed contrary opinions. They insist that if a plan of partial desegregation is adopted, each step should include not less than a normal functioning unit, i.e., elementary schools, junior high schools, or high schools. They further insist that any plan adopted should be a "total plan" in that it should set forth all steps to be taken to accomplish complete desegregation together with the time for taking each step in order that all interested parties will know definitely what to expect for the future.

#### [Effect of Brown Decision]

In passing upon the adequacy of the plan submitted, this court must give effect to the implementing opinion in the second Brown case, *Brown v. Board of Education*, 349 U.S. 294, 99 L.Ed. 1083, wherein the Supreme Court stated, *inter alia*, as follows:

"Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility

in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

From the foregoing language it is thus clear that the district courts in fashioning decrees in cases of this nature are to be guided by equitable principles and that they are required, therefore, to give due weight to considerations of

public interest. While it is recognized that the plaintiffs have a personal interest in admission to public schools as soon as practicable on a nondiscriminatory basis, the district courts, as courts of equity, may take into account the necessity for time to eliminate a variety of obstacles in a systematic and effective manner. Primary responsibility for assessing the problems involved rests upon the local school authorities and the function of the courts is strictly judicial in character, i. e., to determine first, whether the action of school authorities constitutes good faith implementation of governing constitutional principles, secondly, whether the school authorities have made a prompt and reasonable start toward full compliance, and third, whether the school authorities have carried the burden to establish that more time is necessary in the public interest, consistent with good faith compliance at the earliest practicable date, to carry out the ruling in an effective manner. It is not the duty of the court to devise a plan of desegregation nor to substitute its judgment in matters of school administration for that of the constituted school authorities.

[*Prompt and Reasonable Start*]

In the instant case, as already indicated, there is a difference of expert opinion as to whether desegregation of the first grade throughout the entire system, effective with the beginning of the September, 1957 school term, constitutes a prompt and reasonable start toward full compliance with the May 17, 1954 ruling of the Supreme Court. But viewing the question as a relative one which addresses itself to the local conditions obtaining in the city of Nashville, the court is of the opinion that the proposed first step is both prompt and reasonable. It involves 3400 students and 115 teachers of whom 1400 students and 42 teachers are Negroes. It will abolish compulsory segregation for 12 per cent of the city's aggregate school population, which is only 2 per cent less than the aggregate school population of the senior high schools.

The evidence justifies the conclusion that desegregation will confront the board with numerous administrative problems, including increased difficulty in procuring and retaining teachers, teaching adjustments required because of differences in achievement levels of students

among Negro and white children, problems arising from a liberalized student transfer system supplanting a strict transfer system, as well as other problems inherent in accomplishing a change so profound and far-reaching in its effects. While it is possible to argue that the first step towards desegregation should include a greater number of grades or at least a normal functioning unit, the court is not able to find from the evidence that the conclusion reached by the board is an unreasonable one.

[*Precise Time Required*]

But although the court is of this view, and although it finds that the school authorities are acting in good faith and have carried the burden of showing that more time is necessary to comply with the decision of the Supreme Court, it cannot find that they have carried the burden of supporting the indefinite time to accomplish full compliance provided for in paragraph 6 of the plan. Paragraph 6 merely provides that the instruction committee of the board shall continue its study of the problem and recommend by Dec. 31, 1957, the time and number of grades to be included in the next step to be taken in further abolishing compulsory segregation.

There is no indication from the plan itself or from the evidence what the instruction committee would recommend to the board or whether, in fact, it would recommend anything more than further delay. Nor is there any indication, if the instruction committee made a recommendation for a substantial further step, whether the recommendation would be approved or disapproved by the board itself. Nor does the plan require the board to take action upon any recommendation by the committee at any particular time. Also, according to the proposal, after the committee once made a recommendation for another step to be taken, its function would have been completely exhausted with no obligation to make recommendations for further steps toward desegregation. It is manifest, therefore, that paragraph 6 makes the plan submitted partial and incomplete, and that it is in effect simply a proposal for indefinite postponement of further desegregation, directly contrary to the mandate of the Supreme Court that full compliance with its ruling shall be accomplished with all deliberate speed.

The provisions of the plan for transfers of students from the school of their zone to another school were apparently adopted upon the basis of the interpretation of the Supreme Court's decision set forth in *Briggs v. Elliott*, 132 F.Supp. 177. In that case a three-judge court presided over by Circuit Judge Parker, construed the Brown decisions of the Supreme Court as not requiring integration but as merely forbidding discrimination, and as not forbidding such segregation as occurs as the result of voluntary action. If this is a correct interpretation, and the court believes that it is, provisions which merely confer upon white and Negro students a nondiscriminatory right to transfer would not appear to violate the Constitution. If the provisions should be applied on a discriminatory basis, any aggrieved party would have an appropriate remedy.

#### [Effect of 6th Circuit Ruling]

The court has examined the recent opinion of the Court of Appeals in *Booker v. State of Tennessee Board of Education*, in which a gradual plan for desegregating Memphis State college was disapproved. But because of material factual differences the decision in that case is not deemed to be in conflict with the conclusions herein reached. The court found in that case that the plan was discriminatory in that it postponed the "qualified plaintiffs for five years in their admission to the freshman class, and expressly contemplates that white students who have registered later than these plaintiffs shall be admitted earlier." Further discrimination was found in the fact that "plaintiffs may be compelled to seek education elsewhere in order to avoid discrimination and to secure a college education now without being deferred for several years." Manifestly the Nashville plan does not contemplate or involve such discrimination between the races. It merely postpones complete desegregation to provide time for the solution of varied administrative problems without impairment or denial of adequate educational opportunities to both races during the period of transition.

#### [Judgment]

Accordingly, the judgment to be entered pursuant to this memorandum will provide as follows:

- (a) That paragraphs 1, 2, 3, 4 and 5 of the proposed plan are approved;
- (b) That paragraph 6 of the proposed plan is disapproved;
- (c) That the board of education shall submit to the court not later than Dec. 31, 1957, a report setting forth a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor;
- (d) That upon the filing of such report the plaintiffs shall have a period of 20 days thereafter within which to file objections thereto;
- (e) That if objections are not filed to the report within said period the report shall be automatically approved;
- (f) That if objections are filed to the report within said period a hearing shall be held thereon before the court upon five days' written notice by the plaintiffs to the defendants, with the burden resting upon the defendants to establish that the plan is adequate to meet the constitutional principles declared in the two Brown opinions;
- (g) That the rights of the plaintiffs and others similarly situated to attend the public schools of the city of Nashville without discrimination on account of race are recognized and declared, but that the issuance of an injunction is withheld pending the filing of the report provided for in paragraph (c) above and the action of the court upon any objections which may be made thereto; and
- (h) That jurisdiction of the action is retained during the period of transition.

In addition to a form of judgment the parties will also submit to the court proposed findings of fact and conclusions of law to implement this memorandum.

## EDUCATION

### Public Schools—Tennessee

**Joheather McSWAIN et al. v. County BOARD OF EDUCATION OF ANDERSON COUNTY, Tennessee, et al.**

United States District Court, Eastern District, Tennessee, December 5, 1956, Civil No. 1555.

**SUMMARY:** In a class action filed prior to the decision of the United States Supreme Court in the *School Segregation Cases*, the United States District Court had directed, on January 4, 1956, that the defendants, school officials of Anderson County, Tennessee, admit pupils to the Clinton high school on a racially non-discriminatory basis beginning with the fall, 1956, school term. 1 Race Rel. L. Rep. 317. At the opening of the fall term, the defendants petitioned the court for a restraining order, alleging that John Kasper and certain other persons were interfering with the defendants' compliance with the court's order. On August 29, 1956, the court issued a temporary restraining order against several named and unnamed persons. The following day a petition for a criminal contempt citation was filed by the defendants against one John Kasper for having violated the restraining order. The court issued an order of attachment and subsequently convicted him of contempt. 1 Race Rel. L. Rep. 872, 1045 (1956). On December 5, 1956, the court issued an order of attachment against sixteen other persons for contempt of the court's order of January 4, 1956. That order follows:

TAYLOR, District Judge.

As appears of record . . . the court heretofore on Jan. 4, 1956, entered an order requiring and directing the discontinuance of racial segregation in Clinton High School, said school being one of the high schools of Anderson County, Tennessee, and located in the town of Clinton; that pursuant to said order the school officials of Anderson County by their official action ordered integration in the school of Negro and white students to become effective at the beginning of the fall term of school of the present year of 1956; that integration was accordingly put into effect by the administrative officials and teachers of the school; that notwithstanding official compliance with the court's order of Jan. 4, 1956, opposition from others than the said officials and teachers arose, aimed at preventing the effectiveness of integration and restoration of the school as a segregated school; that in response to a petition of D. J. Brittain Jr. and others, of Aug. 29, 1956, the court on said Aug. 29, 1956, issued a temporary restraining order against one John Kasper and others enjoining and restraining them, their agents, servants, representatives, attorneys, and all other persons who were acting or who may act or have acted in concert with them "from further hindering, obstructing, or in any wise interfering with the carrying out" of the integration order of Jan. 4, 1956; that thereafter on Sept. 6, 1956,

said temporary restraining order was made permanent; that despite the court's order of Jan. 4, 1956 and the aforesaid injunction, certain individuals have engaged in acts of violence toward Negro students who enrolled in and undertook to attend Clinton High School; that said individuals have carried on a deliberate and persistent campaign of intimidation against school officials; have organized or joined a White Citizens Council aimed at preventing the effectiveness of integration; have made threats of violence against persons who have cooperated with school officials in their efforts to carry out the court's integration order; have engaged in picketing and congregating in the immediate vicinity of the school building for purposes of intimidation and other devices for prevention of the effectiveness of integration; have entered the school building itself and engaged in acts of intimidation and violence for the same purpose; have instigated acts of violence on the part of white students against Negro students; have offered bribes to white students as a means of inducing acts of insult and violence against Negro students; have committed acts of assault and battery against Negro students on their way to school and against one or more white persons who have undertaken to escort and protect Negro students on their way to or from school; and by the foregoing and various other similar acts have created a condition of lawlessness

within and without said school of such dangerous and intolerable character as to force the closing of the school by the school officials of Anderson County.

And it having been made to appear to the court that one or more of the aforesaid acts in criminal contempt of the court's order of Jan. 4, 1956, and the aforesaid injunction have been committed by the following persons, namely:

Clyde Cook  
 Clifford Carter  
 Zella Nelson  
 Mary Nell Currier  
 Lawrence Brantley  
 Henson Nelson  
 Cleo Nelson  
 Chris Foust  
 John B. Long  
 J. C. Cooley  
 Alonzo Bullock  
 Raymond Wood  
 William Brakebill  
 Thomas R. Sanders  
 W. H. Till  
 Jimmy Pearce

And it further appearing that a petition has been presented to the court by the Honorable

John C. Crawford, Jr., United States Attorney for the Eastern District of Tennessee, charging the above named persons with having individually and/or in concert with one or more other persons committed one or more of said acts of lawlessness by reason of which they are in said petition charged with criminal contempt of this court as defined by Title 18, sec. 401, sub-sec. 3 of the United States Code, in support of which petition sufficient facts by the sworn testimony of witnesses have been presented to the court to justify the conclusions hereinbefore stated respecting the acts of lawlessness charged in said petition against the above named individuals;

It is, therefore, ordered that a writ of attachment be forthwith issued commanding the marshal of this court and his deputies to attach the bodies of the above named individuals and have their bodies before this court in the United States Court House at Knoxville, Tennessee, forthwith, to stand trial on the charge of criminal contempt as alleged in said petition as set out in this order and to show cause why they should not be punished therefor and that a copy of this order be served upon the said individuals at the time they are apprehended.

## BOARD RESOLUTION

Prior to the issuance of the above writ of attachment the Anderson County, Tennessee, School Board had, on December 3, 1956, adopted a resolution which was forwarded to the United States Attorney General asking the aid of federal authorities in enforcing the decree of the federal district court requiring integration. The message forwarded by the School Board follows:

Hon. Herbert Brownell  
 Attorney General of the United States  
 Washington, D. C.

Sir:

On January 4, 1956, the School Board of Anderson County, Tennessee was ordered by the U. S. District Federal Court to open the doors of all high schools in Anderson County to all applicants no later than September, 1956. That we, the members of the School Board of Anderson County, were opposed to integration

of our high school was evidenced by the long fight which we waged in the courts to resist such action, a fight based on our personal conviction that segregation should be continued in the schools. On receiving a federal court decision, however, we as law-abiding citizens, complied.

During September of this year, because of efforts to prevent integration of Clinton High School, the federal court issued an injunction forbidding anyone in Anderson County to interfere with the carrying out of the above order.

Thus, the federal court ordered the School Board of Anderson County to abolish segregation in Clinton High School and also ordered all people in Anderson County not to interfere with desegregation.

The School Board of Anderson County has conscientiously done all in power to comply with the directions of the court. This has been done contrary to our personal convictions on the matter and in the face of constant criticism and harassment from our fellow citizens.

*[Federal Position]*

It now appears, however, the federal authorities are not going to enforce the injunction against the people in Anderson County, although considerable organized effort has been made in recent weeks on the part of students and their parents to interfere with the integration of the high school. As a result the twelve negro students have been staying away from the school for many days.

Considerable confusion has arisen as a result of the Board's conscientious attempt to comply with the court's order abolishing segregation while at the same time the federal authorities (F.B.I. and U. S. District Attorney) fail to enforce the same court's injunction forbidding anyone, including students, from interfering with integration.

The Negro children in the Clinton High School have asked for protection in attending school. The Board does not have legal authority to give protection nor does it wish to assume it. The only penalty which the Board can apply to the present problem is to expel students, an action which obviously was designed to enforce routine school regulations and not to enforce a federal court mandate. The Board's position is that it has complied with the law in opening the

school to all children and that it is the responsibility of others to enforce the injunction if it is to be enforced. The Board feels that its duty is to obey orders of the federal court, not to enforce them. The situation now existing in Clinton High School is not simply a disciplinary problem. For the authorities of the federal government to retreat to their impregnable positions to assume, take the position, that the carrying out of such an order is a "local problem" would seem to be the height of absurdity and wholly inconsistent with reality and other federal government policies.

*[Objection to Policing]*

The Board feels that under no circumstances should the school authorities be expected to police the carrying out of such an order—but rather it is a matter for the appropriate federal authorities. The local F.B.I. agents and U. S. District Attorney's officers spend considerable time in this county tracking down moonshiners and apprehending minors who steal copper from the federal reservation at Oak Ridge, but for some unexplained reason are oblivious to the internationally known Clinton integration problem.

The Anderson County School Board must know whether the Department of Justice intends to continue lack of enforcement of the federal court injunction. If so, it might become necessary to close the Clinton High School so long as we are under court order to abolish segregation.

It is imperative that we hear from you within five days so that we may plan accordingly.

Yours very truly,  
Anderson County Board of  
Education

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## EDUCATION

### Public Schools—Texas

**Alfred Avery, Jr., a Minor, by his mother and next friend, Mrs. Alfred Avery, et al. v. WICHITA FALLS INDEPENDENT SCHOOL DISTRICT et al.**

United States Court of Appeals, Fifth Circuit, January 9, 1957, No. 16148.

**SUMMARY:** Negro school children in Wichita Falls, Texas, brought a class action in federal district court against school district officials. The suit sought a declaratory judgment and injunctive relief recognizing that the school officials could not refuse admission to any public school in the district solely on the basis of race or color. The defendant school officials filed a motion to dismiss. At the hearing on the motion to dismiss the school officials

announced their purpose to begin desegregation of the schools and indicated the steps already taken. The district court found that a good faith start had thereby been made and dismissed the action as moot. On appeal it was urged by the plaintiff Negroes that the case should not have been dismissed as moot. The Court of Appeals for the Fifth Circuit, one judge dissenting, found that there had not, in fact, been any denial of admission to a school on account of race since the dismissal of the suit, but held that the district court should have retained jurisdiction of the case to supervise the implementation of the desegregation plans. The case was reversed and remanded.

Before RIVES, TUTTLE, and CAMERON, Circuit Judges.

RIVES, Circuit Judge.

This action was brought by twenty negro children of public school age, residents of the Wichita Falls Independent School District, as a class action, the complaint averring,

"4. Minor plaintiffs bring this action by their next friends in their own behalf, and on behalf of all other Negro minors who are similarly situated because of race or color within the defendant Wichita Falls Independent School District. They allege that they are members of a general class of persons who are segregated and discriminated against by order of the defendant board of trustees of the defendant Wichita Falls Independent School District because of their race and color; that the members of the class are so numerous as to make it impracticable to bring all of them before this Court; that they, as members of the class, can and will fairly represent all of the members of the class; that the character of the right sought to be enforced and protected for the class is several and that there is a common question of fact and law affecting the several rights of all and a common relief is sought, and that they bring this action by their next friends as a class action pursuant to Rule 23(a)(3), of the Federal Rules of Civil Procedure."

The prayer was for a declaratory judgment as to the rights and privileges of the class, and that the defendants be enjoined from denying to the minor plaintiffs and the members of the class of persons they represent the right and privilege of attending the public elementary school nearest their respective homes "under the same conditions and circumstances and without any distinctions being made as to them on the basis of their race or color."

The defendants moved to dismiss the complaint and in the alternative for a summary

judgment, and the court dismissed the complaint stating in its order of dismissal that:

"taking into consideration all of the proof, the declared purpose and policy of the defendants to carry out desegregation in the schools of the District during the next school term, the progress already made and the definite prospect that such voluntary adjustment will be accomplished within a matter of months, it appears to the Court that judicial intervention under the equity powers at this time would be premature or inadvisable, and the Court is also of the opinion that the specific grievance alleged by the plaintiffs, from being denied entrance at the Barwise School, has now become moot."

The negro population in the Wichita Falls Independent School District lived largely in one single concentrated area. At the time the action was filed, some fourteen to sixteen negro children along with 680 white children attended the Sheppard Air Force Base Elementary School which was operated on a non-segregated basis,<sup>1</sup> and nearly all other negro pupils in the Wichita District, slightly over a thousand, attended the Booker T. Washington School, a school operated for negroes only. The answer admitted that,

"Present statistics indicate that there are approximately 140 colored students who should be admitted to Barwise school if the district comprises a compact unit situated within its natural access boundaries."

In addition there were still other negro children of school age, about seventeen in number, residing within the areas served by various other schools in the Wichita District, but who were "automatically" transferred to the Booker T.

1. It had been desegregated at the request of the United States Department of Health, Education and Welfare.

Washington School. Altogether more than 13,000 pupils were enrolled in the schools of the Wichita Falls Independent School District. No negro child was going to any school other than the Booker T. Washington School and Sheppard Air Force Base School.

*[Application Refused]*

The plaintiffs lived in the area served by the Barwise School. At the opening of the school term in September, 1955, they applied for admission to that school and it is admitted that they were refused on racial grounds. The Barwise School was then being attended by white children only, but a new school was under construction in Sunnyside Heights, a white section of the town, to which it was planned to transfer the white pupils. The new school had been scheduled for completion by September, 1955, but was not actually completed until January, 1956, after the present suit had been filed. The white pupils were then transferred from Barwise to the new school; Barwise was renamed the A.E. Holland School after a former negro principal of the Booker T. Washington School, and was opened on a nominally desegregated basis though only negro pupils, including the minor plaintiffs, registered.

*[Start Made]*

The Superintendent of Schools testified that a start had been made toward desegregating the schools because the Sheppard Air Force Base School had been desegregated and was attended by white children and by some fourteen to sixteen negro children, and because the A. E. Holland School was legally desegregated though actually attended by negro children only, and, further, that it was the intention of the Board to completely desegregate the entire district "at the earliest feasible moment", that "by the beginning in September of this, of 1956, we will have a very good beginning; and by midterm of 1957 it's altogether possible that the entire school system could be desegregated."

Clearly plaintiffs seeking judicial relief from racial discrimination applied against the members of a numerous class may maintain a class action.<sup>2</sup>

At the time the district court dismissed the

2. Rule 23, F.R.C.P.; The School Segregation Cases, 347 U.S. 483, 495; Beal v. Holcombe, 5th Cir., 193 F.2d 384; Frasier v. Board of Trustees of University of North Carolina, 134 F.Supp. 589, 593,

complaint, a part of the plaintiffs' prayer had been met, that is they were attending the public school nearest their homes, but it is by no means certain that they had the same free privilege of transfer to or attendance on any school of their choice as was accorded the white children. Admittedly desegregation of the schools of the district had not then been completed, though the defendants professed such a purpose, and the court thought that it would be accomplished "within a matter of months".

*[Superintendent's Affidavit]*

Upon this appeal, the appellees have attached as an exhibit to their brief an affidavit of the Superintendent of Schools to the effect that the 1956 summer session of the Wichita Falls Senior High School was non-segregated and was actually attended by 411 white and 15 negro children; that, on September 5, 1956, all pupils were admitted to the schools to which they applied for admission without any discrimination because of their color, though no negro children applied for admission to any school except Sheppard Air Force Base School, Booker T. Washington School and A. E. Holland School. The appellees urge upon us that, if not moot at the time the district court dismissed the complaint, the cause has now become moot and that the appeal should be dismissed or that the judgment of the district court should be affirmed.

The appellants, on their part, deny that the public schools within the Wichita Falls Independent School District have actually and in good faith been desegregated, and insist that, it being undisputed that when the complaint was filed the defendants had denied to the plaintiffs solely on account of their race the right to attend the school of their choice, a claimed cessation of such unlawful conduct would not render the action moot nor justify its dismissal.<sup>3</sup>

affirmed per curiam 350 U.S. 979; Holmes v. City of Atlanta, N.D. Ga., 124 F.Supp. 290, 293, affirmed 5th Cir., 223 F.2d 93, modified and remanded 350 U.S. 879; Kansas City, Mo. v. Williams, 8th Cir., 205 F.2d 47, 51, 52; Wilson v. Board of Supervisors, E.D.La., 92 F.S. 986, aff'd per curiam, 340 U.S. 909.

3. For this position, the appellants cite and rely on the following cases: United States v. Freight Ass'n., 166 U.S. 290; United States v. U.S. Steel Corp., 251 U.S. 417; Trade Comm'n v. Goodyear Co., 304 U.S. 257; Walling v. Helmerich & Payne, 323 U.S. 37; United States v. Oregon Med. Soc., 343 U.S. 326; United States v. W. T. Grant Co., 345 U.S. 629.

The Constitution as construed in the School Segregation Cases, *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294, and *Bolling v. Sharpe*, 347 U.S. 497, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in *Briggs v. Elliott*, E.D. So. Carolina, 132 F.Supp. 776, 777:

"• • • it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Keeping that principle in mind, we cannot say that the district court abused its discretion in declining to enter a decree declaring the rights of the parties or enjoining against discrimination. The primary responsibility rested upon the Board, and the district court had the discretion to withhold action when convinced that the Board had made "a prompt and reasonable start" and was proceeding to a "good faith

compliance at the earliest practicable date."<sup>4</sup> Such start and continuation were steps, but no more than steps, toward compliance, and, until that goal was reached, the plaintiffs and the class represented by them would be denied their constitutional right to be free from state imposed discrimination because of their race or color. In the Brown Case, *supra*, it appeared that,

"The presentations \* demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation." 349 U.S. at p. 299.

The Court nevertheless directed that, "During this period of transition, the courts will retain jurisdiction of these cases." 349 U.S. at p. 301. See also, *Brown v. Rippy*, 5th Cir., 233 F.2d. 796.

#### [Case Not Moot]

We are of the clear opinion that, at the time of the rendition of judgment by the district court, the case had not become moot and that it was error to dismiss the action.

The cases relied on by appellants establish the proposition that voluntary cessation of illegal conduct does not make the case moot. If, however, in addition the court finds that there is no reasonable probability of a return to the illegal conduct, and that no disputed question of law or fact remains to be determined, that no controversy remains to be settled, then it should not adjudicate a cause which no longer exists. *United States v. W. T. Grant Co.*, *supra*, 345 U.S. at 633; *Brownlow v. Schwartz*, 261 U.S. 216. It cannot be claimed that the appeal has become moot through compliance with a proper decree. Instead, the claim is that the entire case has become moot through cessation of the unlawful conduct. Ordinarily, such a claim should be considered by the trial court in the first instance. It is said, however, that in so far as the law is concerned no question is now presented which has not already been settled by the School Seg-

4. *Brown v. Board of Education*, 349 U.S. 294, 300.

regation Cases, *supra*, and that is true. The facts, on the other hand, may be subject to more than one interpretation. The appellants question whether the actual segregation existing in most of the schools is, in fact, voluntary. Events which have occurred since the judgment of dismissal, or which may occur in the future may constitute "good faith compliance", but, in the present circumstances, that question should not be determined by this Court on the basis of ex parte affidavits; such an issue depending largely on the good faith of the defendants can be better decided by the district court after a full and fair hearing. "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these

cases can best perform this judicial appraisal." *Brown v. Board of Education*, *supra* at p. 299. The district court should retain jurisdiction for the entry of all judgments and orders necessary to ascertain, or else to require, "good faith compliance."

The judgment is, therefore, reversed and the cause remanded.

Reversed and remanded.

Judge Cameron Dissents.

[*Judge Cameron's dissenting opinion, which was filed on January 25, 1957, was received too late for inclusion in this issue. It will be printed in the April, 1957, issue of Race Rel. L. Rep.*]

## EDUCATION Public Schools—Texas

**Albert BELL, a Minor, by his stepfather and next friend, Theodore D. Dorsey, et al. v. Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District, Dallas County, Texas, et al.**

United States District Court, Northern District, Texas, December 19, 1956, 146 F.Supp. 485.

**SUMMARY:** In a class action, Negro school children in Dallas County, Texas, sought a declaration of rights and injunctive relief in a federal district court with respect to their admission to public schools in that county on a non-segregated basis. The district court refused a motion to convene a three-judge district court, found that the public school facilities furnished for white children and Negroes were substantially equal, and held that the United States Supreme Court's implementation decision in the *School Segregation Cases* required that integration be accomplished on the basis of planning to be done by the school officials and the lower courts. The district court further found that no such plan then existed, and dismissed the suit without prejudice. 133 F.Supp. 811, 1 Race Rel. L. Rep. 318 (N. D. Tex. 1955). On appeal the Court of Appeals, Fifth Circuit, one judge dissenting, held that there was no basis in the evidence nor in law for the action taken by the district court and vacated, reversed and remanded the cases. *Brown v. Rippy*, 233 F.2d 796, 1 Race Rel. L. Rep. 649 (1956). On the remand the district court, indicating that it would be a "civil wrong" to white pupils to admit Negroes to already crowded white schools, declined to issue an injunction and dismissed the case "in order that the school board may have ample time . . . to work out this problem."

ATWELL, District Judge.

This case was originally filed in September, 1955, and the court dismissed the case, after having heard testimony, without prejudice.

Plaintiffs appealed, and on May 25, 1956, the Circuit Court of Appeals, through two of its judges, reversed, and directed the trial court to afford the parties a full hearing on the issues tendered in their pleadings. In his dissenting opinion, Chief Justice Cameron was most con-

vincing and somewhat elaborate in his citation and reasoning, and announced that he would affirm the lower court.

We must bear in mind that the laws of Texas, for a long time in existence and based upon a constitutional provision, provide for public schools which shall be financed out of and from taxation. For many years, the colored people of Texas have been their own teachers, and have had their own teachers and their own school

facilities and pupils of their own color. The white people have had their own schools with appropriate facilities and teachers.

A year or two ago, the Supreme Court of the United States, on the question of segregation, stated, quoting, "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." That is the end of that quotation from the Supreme Court.

[*Basis of Brown Decision*]

I believe that it will be seen that the court based its decision on no law but rather on what the court regarded as more authoritative, modern psychological knowledge than existed at the time that the now discarded doctrine of equal facilities was initiated. It will be recalled that in 1952, Mr. Justice Frankfurter said it was not competent to take judicial notice of, "claims of social scientists".

The testimony, which has been fully developed under the pleadings of each side in this case, as directed by the majority opinion of the Circuit Court of Appeals, shows unmistakably that competent teachers, equal school facilities, and text books, and all sorts of school paraphernalia are furnished to both the white and colored schools and pupils, and so the sole question for the determination of this court of equity is whether the keeping apart of the two races is a deprivation of any constitutional right. There is no complaint against the colored teachers, though we might quite appropriately inquire what would become of the colored teachers if and when the colored students are taken away from them. Is it possible or probable that the colored teachers would be hired to teach the white pupils? There is no complaint by the plaintiffs against the competency of the colored teachers nor against the impedimenta or physical features of the school buildings and the school grounds, or the size.

[*Integration Attempted*]

Furthermore, the suggestion of the Supreme Court that the involved parties should studiously and carefully seek to integrate seems to have

been attempted here; but so far has not succeeded; but it has not been abandoned by the school authorities. I think that the testimony shows completely that the school authorities here in charge of this independent school district are certainly doing their very best to comply with the ruling of the Supreme Court of the United States. And that court, it will be recalled, left it up to the school authorities and the local courts to further this integration process.

In the Wichita Falls division a few years ago, this court tried a case brought by some colored children against a midwestern university, which would not allow them to matriculate. The court entered an order, after a full trial, an order allowing them to be admitted as students; because there was no near institution in which they could matriculate other than Prairie View, which was approximately three hundred miles distant. That case was affirmed by the Circuit Court of Appeals, and also by the Supreme Court of the United States.

[*Civil Rights v. Civil Wrongs*]

It should also be borne in mind that the state statute requires separate schools for colored and white students. This suit is brought, therefore, under the national civil rights of the Constitution, and not under the state statutes, as the counsel for the defendants contends here. There is no question here as to the administrative procedure or administrative course that should be followed. We have civil rights for all people under the national Constitution, and I might suggest that if there are civil rights, there are also civil wrongs.

It seems to me, in view of the facts, that the white schools are hardly sufficient to hold the present number of white students; that it would be unthinkable and unbearably wrong to require the white students to get out so that the colored students could come in. That would be the result of integration here.

[*Case Dismissed*]

The facts reveal that there are about fifteen per cent of the 119,000 students in Dallas that are colored, and the remainder of that vast amount are, of course, white students. Dallas is constantly growing, as the testimony shows, and the school board and city council are constantly making further expenditures to increase school facilities for each white and colored, and I see

no equity here, gentlemen, which would require an injunction which would compel integration as prayed and sought at the present time. I therefore dismiss this suit without prejudice in

order that the school board may have ample time, as it appears to be doing, to work out this problem.

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## EDUCATION

### Public Schools—Texas

**Herminio HERNANDEZ et al. v. DRISCOLL CONSOLIDATED INDEPENDENT SCHOOL DISTRICT et al.**

United States District Court, Southern District, Texas, September 25, 1956, Civ. No. 1384.

**SUMMARY:** School children of Mexican descent in public schools in Driscoll, Texas, brought action in federal district court against school officials of that city and state. The school children stated that the practice of the school officials of placing school children of Mexican descent in separate classes for the first and second grades of school and of requiring their attendance in these two grades for a period of four years was in deprivation of their rights under the Fourteenth Amendment to the United States Constitution as being discrimination on the basis of ancestry. The school children asked for injunctive relief and for money damages. The school officials answered that the segregation complained of was not done on the basis of race or ancestry but solely because of the inability of some beginning school children to speak or understand English. The school officials also filed a counter-claim asking that the parents of the school children involved be restrained from speaking any language but English in the presence of their school-age children and requiring the parents not to permit the children to associate with anyone who does not speak English. Following a pre-trial hearing the court, on agreement of the parties, dismissed the action except as to claims for nominal damages by the plaintiffs. Following the order of the court dismissing the action, below, some of the pleadings in the case are set out.

## ORDER

ALLRED, District Judge.

At a pre-trial hearing in the above numbered and entitled cause, held on September 7, 1956, and attended by attorneys of record for all parties plaintiff and defendant, the Court was informed that on October 11, 1955, the defendant Ed. Pohlmeyer resigned as a member of the Board of Trustees of Driscoll Consolidated Independent School District, and Kenneth Harlan was appointed to fill the unexpired term of Ed. Pohlmeyer as such Trustee, and that subsequently thereto Kenneth Harlan has been elected as a Trustee at the regular election of Trustees; and the Court having been informed by the attorney for plaintiffs that the plaintiffs would not further prosecute their alleged cause of action for damages against the defendants, except for nominal damages, it is therefore ORDERED as follows:

That defendant Ed. Pohlmeyer be, and he is hereby, in all things dismissed as a party to this suit.

That Kenneth Harlan, as a member of the Board of Trustees of Driscoll Consolidated Independent School District, be, and he is hereby, substituted as a party defendant herein in the place of said Ed. Pohlmeyer, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by plaintiffs against said Kenneth Harlan as successor in office of said Ed. Pohlmeyer; and that such substitution of parties shall be made by interlineation, by deleting from the Complaint the name of Ed. Pohlmeyer and interlining therein the name of said Kenneth Harlan. An Answer having been filed herein by said Kenneth Harlan, no summons need be issued or served upon him.

That all claims and prayers of all plaintiffs herein seeking to recover damages of and from any and all defendants herein be, and the same

are hereby, dismissed, except as to the claims and prayers for nominal damages.

## COMPLAINT

For a first cause of action, being an action for injunctive relief, Plaintiffs allege:

### I.

This Court has jurisdiction of this cause under the provisions of 28 U. S. Code, Section 41 (14), in that this is a suit, in equity and at law, to redress the deprivation of Civil Rights; said deprivation being by officials of the State of Texas, under color of custom, common design, usage or practice by said State Officials, acting for and in behalf of the State of Texas, of rights, privileges and immunities secured by the Constitution of the United States under the Fourteenth Amendment, and rights secured by the law of the United States, including particularly 42 U. S. Code, Section 1981-1983 (formerly 8 U. S. Code, Section 43).

### II.

1. Plaintiffs Herminio Hernandez, Angelita Hernandez and Jesusita Hernandez attend in the second, first and "beginners" grades, respectively, in the public schools at Driscoll, Texas. They are citizens of the United States of Mexican descent. Plaintiff Victor H. Hernandez is the father of Herminio, Angelita and Jesusita Hernandez and is a citizen of the United States of Mexican descent. Said Plaintiffs, Herminio, Angelita and Jesusita Hernandez file this suit herein by said Victor H. Hernandez as father and next friend.

2. Plaintiffs Gilbert Garza and Juan Jose Garza are citizens of the United States of Mexican descent and attend the second and first grade, respectively, in the public school of Driscoll, Texas. Plaintiff Manuel Hernandez stands as the father of the said Gilbert Garza and Juan Jose Garza, and is a citizen of the United States of Mexican descent. Said Plaintiffs, Gilbert and Juan Jose Garza file this suit herein by said Plaintiff Manuel Hernandez, standing as father and next friend.

3. Plaintiffs Dovie Trevino, Victoria Trevino and Fermin Trevino are citizens of the United

States of Mexican descent and attend second, first and beginner's grade, respectively, in the public school of Driscoll, Texas. Plaintiff Santos Trevino is the father of the said Dovie, Victoria and Fermin Trevino, and is a citizen of the United States of Mexican descent. Said Plaintiffs, Dovie, Victoria and Fermin Trevino file this suit herein by said Plaintiff Santos Trevino, as father and next friend.

4. Plaintiffs Oscar Trevino and Olga Trevino are citizens of the United States of Mexican descent and attend second and first grade, respectively, in the public school of Driscoll, Texas. Plaintiff Paulo Trevino is the father of the said Oscar and Olga Trevino, and is a citizen of the United States of Mexican descent. Said Plaintiffs Oscar and Olga Trevino file this suit herein by said Plaintiff Paulo Trevino, as father and next friend.

5. Plaintiffs Maria Aleman, Guadalupe Aleman and Maria Dolores Aleman are citizens of the United States of Mexican descent and all attend the first grade in the public school of Driscoll, Texas. Plaintiff Jesus Aleman is the father of the said Maria, Guadalupe and Maria Dolores Aleman, and is a citizen of the United States of Mexican descent. Said Plaintiffs, Maria, Guadalupe and Maria Dolores Aleman file this suit herein by said Plaintiff Jesus Aleman, as father and next friend.

### III.

1. The Defendant Driscoll Consolidated Independent School District is a duly organized and existing Independent School District under the laws of the State of Texas; and as such has jurisdiction and control over the public schools within said district; said district is within the jurisdiction of this Court. The Defendants R. C. Little, Ed. Pohlmeyer, J. W. Davis, Cecil Catlett, B. H. Pfluger, Clyde Kastner, Nelson Brown, as trustees of said district; Gordon Green, is the Superintendent of Schools of said school district and all are residents of Nueces County, Texas, within the Jurisdiction of this Court and as such officers and defendants have charge and

control over the administration of said Driscoll Consolidated Independent School District and over all public schools located in said school district; as such officers, said defendants determine and enforce policies of said school district and schools therein located; the Defendant, Gordon Green, as Superintendent of Schools of said District is the Executive Officer of said School Board of said District.

2. J. W. Edgar, defendant herein, is the State Commissioner of Education created by and acting under the authority of Articles 2654-2655 of the Revised Civil Statutes of Texas. As such, he is the Executive Officer of the State Board of Education of the State of Texas and has the duty to observe, carry out and execute the mandates, prohibitions and regulations pertaining to public schools established by law; he has general supervisory power over local school districts, and power to prescribe rules and regulations for said districts and to otherwise exercise all the powers and duties formerly vested in the State Superintendent of Public Instruction. He is a resident of Travis County, Texas, and within the jurisdiction of this Court.

3. All of the Defendants herein are officers and/or agents of the State of Texas and are acting and have acted under color of authority of the State of Texas.

#### IV.

1. The Defendants have exceeded the authority vested in them by the Constitution and Laws of the State of Texas in that they carry out a policy of segregating children of Mexican descent from other children as hereinafter more fully set out and by participating and/or aiding and abetting in the hereinafter mentioned discriminatory practices and unfair and unjust treatment towards plaintiffs and other children of Mexican descent. The defendants have adopted a common custom, plan, usage or practice as follows: That children of Mexican descent and Plaintiffs herein are barred, prohibited and excluded, solely because of said Mexican descent, from attending certain classes and/or section of classes, and that said children of Mexican descent and Plaintiffs are segregated into classes and sections of classes which were established and are maintained exclusively and solely from the attendance of plaintiffs and other children of Mexican descent.

2. Pursuant to such custom, usage and practice, defendants have established and maintain separate classrooms for the first and second grades, for Plaintiffs and other children of Mexican descent, and used exclusively for children of Mexican descent.

That Defendants have established and maintain a practice of retaining children in said classes for a period of three school years in the first grade and an additional school year in the second grade. That as a result of said practice your Plaintiffs are required to attend school for four years to complete the work performed by other school children in said school in a period of two years. That during this entire four-year period, said children are kept and maintained in separate classrooms used by and composed of classes comprised exclusively of children of Mexican descent.

3. That by reason of such custom, plan, usage or practice, the above named defendants have prevented plaintiffs and other children of Mexican descent, from receiving the educational, health, psychological and recreational benefits provided by said defendants for other school children in said School District; that such customs, usage, plan or practice is intended to and does discriminate against plaintiffs and other children of Mexican descent solely because of their Mexican ancestry.

Pursuant to said custom, usage, and/or common plan, the above named Defendants have prohibited, barred and excluded, and do now prohibit, bar and exclude, the Plaintiffs, and all such school children of Mexican descent, from attending the certain regular classes, within their charge and under their control, and said Defendants have thus prevented said school children of Mexican descent, from receiving the educational, health, psychological and recreational benefits which such other children receive in said regular schools and classes; and the said Plaintiffs, and said children of Mexican descent have been generally and continuously assigned to certain segregated classes intended exclusively for said children of said Mexican descent.

#### V.

The Defendant J. W. Edgar has been apprised of the existence of said customs, usages, plan and practices constituting segregation and discrimination against plaintiffs and said chil-

dren of Mexican descent; but he has failed and refused to take any action in behalf of plaintiffs and other children of Mexican descent of said School District. Plaintiffs will show that said Defendant J. W. Edgar acting as State Commissioner of Education of said State and acting under color of authority, by failing and refusing to discharge his duties under the law, has condoned such practices and has aided and abetted the other defendants in their violation of the law, and has therefore participated in these customs, usages and practices.

## VI.

This suit is brought by the Plaintiffs for and in behalf of themselves and for and in behalf of all other school children of Mexican descent within the said Driscoll Consolidated Independent School District, within which School District plaintiffs reside, and this suit is filed as a Class Suit for and in behalf of said children of Mexican descent so residing in that, as heretofore set forth in this complaint, all of said children of Mexican descent are in the same class as said plaintiffs in that they are required to attend said classes, and segregated from other children solely because they are of Mexican descent; said Class is so numerous that it is impracticable to bring all of its members before the Court; and the character of the rights sought to be enforced herein is several and there are common questions of law and of fact affecting the several rights of the school children of Mexican descent constituting said class; that a common relief is sought by said school children of Mexican descent against all of the Defendants herein.

## VII.

Unless enjoined by order of this Court both by permanent injunction and by injunction *pendente lite*, the Defendants intend to continue to practice the customs and usages aforesaid, and to continue the general practice of segregation and discrimination against said children of Mexican descent and Plaintiffs herein. Plaintiffs and the Class in whose behalf this proceeding is filed, have no plain, speedy or adequate remedy at law, and will suffer great and irreparable damage, injury or harm unless an injunction *pendente lite* and a permanent injunction are issued by this Honorable Court enjoining said practice, custom and/or usage.

## [Second Cause]

For a second cause of action, being a cause of action for damages against the Defendants, Driscoll Consolidated Independent School District and R. C. Little, Ed. Pohlmeyer, J. W. Davis, Cecil Catlett, B. H. Pfluger, Clyde Kastner, Nelson Brown, trustees of said district; Gordon Green, Superintendent of Schools of said School District; J. W. Edgar, State Commissioner of Education; the Plaintiffs allege:

### I.

The Plaintiffs herein incorporate all of their allegations heretofore set forth in their first cause of action in Part I-VI, inclusive.

### II.

The Plaintiffs as aforesaid, by the acts of the Defendants complained of, were deprived of their rights under the Constitution of the United States and the laws of the United States to be free from discrimination solely because of their ancestry; and were thus denied the right, by the Defendants, jointly and severally, to receive an education in the regular schools classes and sections of classes, free from such discrimination; and were further delayed in school and deprived of earnings which they could otherwise gain through employment for a period of two years which they have been required to attend school in excess of the time otherwise required to complete school, as the result of the aforesaid action of the Defendants, jointly and severally, and that said Plaintiffs have been deprived by said Defendants from securing the educational, recreational and health benefits accorded by said defendants to other children, to the damage of the plaintiffs, and each of them, in the sum of Four Thousand (\$4,000.00) Dollars.

### III.

The acts of all of said defendants, Driscoll Consolidated Independent School District of Nueces County, Texas, and R. C. Little, Ed. Pohlmeyer, J. W. Davis, Cecil Catlett, B. H. Pfluger, Clyde Kastner, Nelson Brown, as Trustees of said School District; Gordon Green, Superintendent of said School District; J. W. Edgar, State Commissioner of Education, were and have been wanton, reckless and malicious and with a complete disregard of the rights of the

Plaintiffs, by virtue whereof the Plaintiffs, and each of them, are additionally entitled to punitive or exemplary damages in the sum of Four Thousand (\$4,000.00) Dollars.

WHEREFORE, Plaintiffs pray for the following relief:

Under their first cause of action, Plaintiffs pray for judgment and decree granting a permanent injunction, and for an order granting an injunction *pendente lite*, against all the Defendants in behalf of the plaintiffs, and the school children of Mexican descent represented by them, enjoining said defendants and their agents from in any manner assigning into segregated schools and classes or school sections of classes school children of Mexican descent under their control; and from in any manner, directly or indirectly, participating in said practices of discrimination and segregation.

Under their second cause of action, Plaintiffs

pray for damages in behalf of Plaintiffs, and each of them, against the following defendants, and each of them, Driscoll Consolidated Independent School District and R. C. Little, Ed. Pohlmeyer, J. W. Davis, Cecil Catlett, B. H. Pfluger, Clyde Kastner, Nelson Brown, as Trustees of said District; Gordon Green, Superintendent of said District; J. W. Edgar, State Commissioner of Education; in the sum of Four Thousand (\$4,000.00) Dollars actual damages, and additionally, the sum of Four Thousand (\$4,000.00) Dollars as punitive or exemplary damages.

And Plaintiffs further pray for such other relief to which they may be justly entitled.

RICHARD CASILLAS  
ALBERT PENA, JR.  
JAMES DEANDA  
By  
/s/ James DeAnda

## ANSWER OF DRISCOLL

The defendants Driscoll Consolidated Independent School District, of Nueces County, Texas, and R. C. Little, J. W. Davis, Cecil Catlett, B. H. Pfluger, Clyde Kastner and Nelson Brown, as Trustees of said School District, and Gordon Green, Superintendent of said School District, file this their answer to the complaint, and therefor say:

### First Defense

The complaint fails to state a claim against these defendants upon which relief can be granted.

### Second Defense

1. These defendants admit that the complaint contains allegations in paragraph I, which, if true, show that this Court has jurisdiction; but these defendants deny the allegations of paragraph I of the complaint insofar as they constitute allegations of fact.

2. These defendants admit the allegations of paragraph II of the complaint, save and except that they deny the allegations in sections 1 and 3 of said paragraph II referring to a "beginners'" grade. In this connection, these defendants say that there is no grade at this time in the Driscoll School system which is entitled a "beginners'" grade.

3. These defendants admit the allegations in section 1 of paragraph III of the complaint, except the allegation that Ed. Pohlmeyer is a trustee of Driscoll Consolidated Independent School District. In this connection, these defendants say that the defendant Ed. Pohlmeyer resigned his office as trustee at a meeting of the Board of said School District on the 3rd day of October, 1955, and his resignation was accepted by action of the Board at a meeting held on the 11th day of October, 1955.

These defendants admit that the defendant J. W. Edgar is the State Commissioner of Education, but say that they are without information as to whether he is a resident of Travis County, Texas, and within the jurisdiction of this Court. As to the other allegations contained in section 2 of paragraph III of the complaint, these defendants say that the same constitute conclusions of law rather than allegations of fact, and such conclusions are too broad for appropriate specific denial or admission, and these defendants therefore deny such allegations.

4. These defendants deny all of the allegations contained in paragraph IV of the complaint. In connection with section 2 of paragraph IV of the complaint, these defendants say: These defendants maintain, or cause to be maintained, separate classrooms for the children in the first

and second grades who, upon first entering school, are unable to speak the English language, without regard to whether such children are of Mexican descent; and these defendants maintain, or cause to be maintained, separate classrooms for the children who, upon first entering school, and while remaining in the first and second grades, are able to speak the English language, without regard to whether such children are of Anglo-American descent, or of Mexican descent, or of any other Latin descent; and the only factor which determines whether children in the first and second grades are placed in one classroom or the other is the child's ability or lack of ability to speak the English language; and these defendants specifically deny the allegation that they maintain separate classrooms used exclusively for children of Mexican descent. These defendants do not have a practice of retaining children of Mexican descent, as distinguished from children of any other descent, in the first and second grades for a total period of four years. These defendants say that it is true that many of the children who are of Mexican or other Latin descent are unable to speak the English language upon entering school, and therefore many of such children are found to be unable to complete the work of the first and second grades within a period of two years and are retained until they do complete such work; but these defendants specifically deny that they have established or maintained any practice of retaining children in the first or second grades because they are of Mexican descent; and, any child, regardless of race or ancestry, may be retained in the first or second grade if he or she has failed to complete the work of such grade so that he or she can do and understand the work of the next higher grade.

5. These defendants deny the allegations contained in paragraph V of the complaint, because they say there are no unlawful customs, usages, plans and practices of which the defendant J. W. Edgar could be apprised or which he could condone, aid or abet, or as to which he could have taken any action.

6. These defendants deny all of the allegations contained in paragraph VI of the complaint. In this connection, these defendants say that all of the children of Mexican descent within the Driscoll Consolidated Independent School District are not in the same class with reference to the matters involved in this suit, because there

is no separation or segregation of any kind or character in any part of the school system of said School District because of race, language deficiency, or for any other reason, save and except in the first and second grades where separate classrooms are maintained only for reasons of deficiency in the English language; and therefore the children of Mexican descent within said School District who are in the grades above the first and second grades would have no interest in the matters involved in this suit. These defendants further say that the named plaintiffs in this suit do not properly represent the other children of Mexican descent, as a class, because the named plaintiffs have been selected as plaintiffs solely because they or their parents or next friends are the ones who have employed the attorneys for the plaintiffs herein, as distinguished from those who have not employed the attorneys signing the complaint herein. The named plaintiffs herein are not such persons as will fairly insure the adequate representation of all of the persons in the class referred to in paragraph VI of the complaint.

7. These defendants deny the allegations in paragraph VII of the complaint. In this connection, the defendants say that there does not exist any custom, usage or practice which constitutes segregation or discrimination or which is in any manner unlawful, and therefore there does not exist anything for these defendants to continue which should be enjoined.

8. In paragraph I of what is entitled a second cause of action in the complaint, the plaintiffs incorporate the allegations in paragraphs I-VI of the complaint, and these defendants here now by reference admit or deny such allegations as hereinabove set forth in answer to the first cause of action in the complaint. These defendants deny all of the allegations contained in paragraphs II and III under the heading of second cause of action in the complaint.

### Third Defense

There does not exist within the public school system of the Driscoll Consolidated Independent School District any segregation or discrimination because of the race or descent of any persons, nor for any other unlawful or improper reason. All of the students in the third grade and all of the grades above the third grade are in the same classrooms and are not segregated for any reason. Approximately two-thirds of the stu-

dents now enrolled in said school system are of Mexican descent or other Latin-American descent. For reasons over which these defendants have no control whatsoever, such reasons consisting principally of the failure and refusal of the parents to teach their children the English language and to speak the English language in the home, the great majority of the students of Mexican descent or other Latin-American descent, upon becoming of school age and entering school for the first time, are found to speak no English and to understand no English when spoken to them. Under the terms and provisions of Article 288 of the Penal Code of the State of Texas, it is required that the teachers in this and other school districts shall use the English language exclusively and that all recitations and exercises shall be conducted in the English language, and it would be a crime for the teachers to violate said Article 288, and would be a crime for these defendants to cause or permit the teachers to violate said Article 288. It is therefore necessary that all students who are unable to speak and understand the English language when first entering school, must be taught to speak and understand the English language before they can do the work required by the course of study for the respective grades in the school system. However, those students who do speak and understand the English language when first entering school, whether they are of Mexican or other Latin descent, or Anglo-American descent, are able to begin and understand the course of study prescribed for the first grade. If the students who speak and understand the English language, and the students who do not speak and understand the English language, were all placed in the same classroom, such would work to the detriment of all the students, because those who speak and understand the English language would be held back and retarded in their work, or else those who do not speak and understand the English language would be unable to learn the course of study prescribed, depending upon whether the English language was taught to those not knowing it before beginning the course of study. For those reasons, the students in the Driscoll School system who do not speak and understand the English language are placed in a separate classroom from the students who do speak and understand the English language upon first entering school, and are retained in such separate classrooms through the first and second grades only

for such length of time as is found necessary in the case of each individual student. All students in the Driscoll School system, without regard to race, descent, ability to speak and understand the English language, or any other factor, are furnished the same equipment and supplies for both studies and recreation, share the same playground at the same time, eat in the same cafeteria at the same time as others in the same grade groups where they enter and sit as they please without regard to grade, classroom or descent, participate in the same manner in all recreational and group activity, all without any discrimination or segregation.

This suit has resulted solely from the insistence of parents or other relatives of a small number of students of Mexican descent, acting under the leadership and in the name of certain GI Forum organizations and the officials thereof, that all students in the first and second grades be placed in the same classrooms without regard to ability or lack of ability to speak and understand the English language, and that all students of Mexican descent be promoted each year on the basis of age only, without regard to whether they have completed or learned the work of the grade and without regard to whether they have shown themselves able to do the work of the next higher grade. Although there may be a difference of opinion in regard to such matters by persons experienced or trained in the field or profession of education, the determination of such matters is legally vested in the officials and employees of each local school district, who can and should determine such matters in accordance with the local situation and consideration of what is best for the students, including those of Anglo-American descent, Mexican descent, or any other descent, and the determination of such matters and the details thereof should not be dictated by any group of parents or clubs or other organizations, either with or without the aid of the courts. It is the duty and power of the school authorities of the Driscoll Consolidated Independent School District, as it is of the authorities of any other school district, to plan the method of instruction and to so classify and group the pupils as to bring to each one of the pupils the greatest benefits according to his or her individual needs and aptitudes, and it is the intention and desire of these defendants to continue to perform such duties to the best of their ability without regard to the race or descent of any student.

WHEREFORE, these defendants pray that plaintiffs take nothing by this suit and that these defendants recover their costs.

Respectfully presented,  
BOONE, DAVIS, COX &  
HALE  
ALLEN V. DAVIS  
OWEN D. COX

By  
/s/ Allen V. Davis  
ATTORNEYS FOR THE  
DEFENDANTS HEREIN  
NAMED  
Address:  
610 Wilson Tower  
Corpus Christi, Texas

## COUNTER-CLAIM BY DRISCOLL

The defendant Driscoll Consolidated Independent School District, hereinafter for convenience called School District, files this its supplemental pleading constituting a counter-claim against the plaintiffs Victor H. Hernandez, Manuel Hernandez, Santos Trevino (sometimes called Anastacio Trevino), Paulo Trevino (sometimes called Paublo Trevino) and Jesus Aleman, hereinafter for convenience called Parent Plaintiffs, who are sued both individually and as representatives of all of the parents residing within the boundaries of the Driscoll Consolidated Independent School District who are of Mexican or other Latin-American descent and who have children in the first and second grades or children of pre-school age, as a class, and for cause of action respectfully alleges:

**1st.** The parents residing within the boundaries of Driscoll Independent School District who are of Mexican or other Latin-American descent and also have one or more children of either pre-school age or within the first or second grades, or both, constitute a class so numerous as to make it impractical to bring them all before the court, and above named Parent Plaintiffs will fairly insure the representation in this cause of all of the members of said class. The rights asserted in this counter-claim and sought to be enforced against said class are several and there are common questions of law and fact affecting the several rights, and common relief is sought against all the members of said class.

**2nd.** The parents of approximately two-thirds of the children of pre-school age and the children in the first and second grades residing within Driscoll Independent School District are of Mexican or other Latin-American descent. There exists a custom, practice and usage among a large percentage of such parents, even though

they are citizens of the United States, of speaking only the Spanish language. Even though some of the parents in said class may not be able to read or write the English language, a large percentage of them are able to speak and understand the English language to such an extent that they are capable of carrying on an ordinary conversation in the English language. The failure and refusal of the parents in said class to speak the English language in their respective homes and in the presence of their young children is the principal reason why their children upon entering school are unable to speak the English language.

**3rd.** Children who, upon first entering school, are unable to speak the English language and unable to understand the English language are necessarily not ready to begin the regular course of study prescribed for the first grade, and must first be taught the English language before beginning the course of study prescribed for children who speak and understand English upon first entering school. The teaching of the English language to children who do not speak or understand the same upon entering school, requires a great amount of time and attention from the teachers. If both the children who do and the children who do not speak and understand the English language upon first entering school are required to be placed in the same classroom, all of such children will be retarded, in that those who speak and understand the English language will be deprived of attention and instruction while the teacher is engaged in teaching the English language to the other children, and the children who do not speak and understand the English language will not be able to understand a large percentage of the course of instruction and will be deprived of the attention and instruction by the teacher while the teacher is engaged in instructing those who

do understand the English language. It is therefore to the best interests of the students who do not speak and understand the English language upon entering school that they learn the English language as quickly as possible in order that they may sooner become ready for the regular course of study. If the children who do speak and understand English upon entering school should be required to be placed in the same classroom with said other children, then it is to the best interests of such children who do so speak and understand English that the other children learn the English language as soon as possible in order that the period during which they are so retarded will be made shorter.

**4th.** The minor plaintiffs herein are not of sufficient age and maturity to understand the matters involved in this suit, and this suit has therefore been in fact instituted not by or at the instance of said minor plaintiffs but by the Parent Plaintiffs, who in fact have no right as parents to control the course of education of their children in such a manner as to impair the efficiency of the school system and impair the interests of the pupils who do speak and understand English upon entering school. It is the duty of the parents to cooperate with the schools and the teachers. The custom, practice and usage of the Parent Plaintiffs and the class they represent, to-wit speaking only the Spanish language, prolongs the period of time required for the schools to teach the English language to such children. Therefore, said Parent Plaintiffs and all the members of the class they represent should be required by mandatory injunction, to the extent of their ability, to speak only the English language in the presence of their children who are of pre-school age or who are in the elementary grades, both while school is in session and during the summer vacation months, and such parents should also be required by mandatory injunction to prevent their said children from playing and associating with other children and persons who do not speak the English language. If, during the summer vacation period of three months, Spanish is spoken in the home and spoken by those with whom the children associate, the children forget much of the English they have learned in their first and second school years, and they are further retarded thereby and the expense of operating the school system is increased because of the

necessity to repeat the teaching of English when the children re-enter school for another year. This defendant has no adequate remedy at law, and the additional length of time required to teach the English language to such non-English speaking children greatly increases the expense of operating the school system. The protection of the civil rights of the school children, including both those who do and those who do not speak and understand English upon entering school, requires that said Parent Plaintiffs and the class they represent be so enjoined.

WHEREFORE, this defendant prays that a mandatory injunction be issued by this court requiring said Parent Plaintiffs and all of the members of the class they represent, to speak only the English language in the presence of their children in the elementary grades and of pre-school age, and requiring said parents to not permit their said children to associate and play with persons who do not speak English, and this defendant further prays that by such judgment the Court restrain said parents from speaking any language other than English in the presence of said children, to the extent of their ability to do so. Pleading in the alternative, this defendant says that in the event any of the relief sought by plaintiffs herein is granted, then the relief sought by this counter-claim should be granted in order that complete justice may be done between the parties and the school children to be affected by the Court's judgment with respect to the matters involved herein. This defendant prays for such other relief to which it may be justly entitled, both legal and equitable.

Respectfully presented,  
BOONE, DAVIS, COX &  
HALE  
ALLEN V. DAVIS  
OWEN D. COX

By  
/s/ Allen V. Davis  
ATTORNEYS FOR DEFENDANT, DRISCOLL CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

Address:  
610 Wilson Tower  
Corpus Christi, Texas

## PRELIMINARY PRE-TRIAL ORDER

Plaintiffs are directed to file, on or before March 26, 1956, a "Statement of Plaintiffs' Claims," setting out in detail:

(1) What the defendant, Driscoll Consolidated Independent School District of Nueces County, is doing or has done, of which plaintiffs complain in this action;

(2) What is the defendant Edgar doing or what has he done, of which plaintiffs complain in this action;

(3) If complaint is made as to any written order or documents, copies of such orders or documents shall be attached to the Statement

of Plaintiffs' Claims hereby required to be filed.

Defendants will be required to file, on or before April 28, 1956, a "Reply to Plaintiffs' Claims," in detail.

Thereafter the court will, if necessary, order a further pre-trial hearing.

The foregoing "Statement of Plaintiffs' Claims" and "Defendants' Reply to Plaintiffs' Claims" will be used by the court as the basis for further pre-trial orders herein.

DONE AT CORPUS CHRISTI, TEXAS, this 25th day of February, 1956.

## STATEMENT OF PLAINTIFFS' CLAIMS

TO THE HONORABLE JUDGE OF SAID COURT:

### I.

Plaintiffs complain of the acts and practices of the Defendant Driscoll Independent School District; said Defendant has committed in the past, and continues to commit the following acts:

1. Maintains separate classes consisting solely of children of Latin American descent in the first grade.

2. Maintains separate classes consisting solely of Latin American children in the second grade.

3. Uses an educational system which requires a majority of Latin American children to spend 3 years in the first grade in

school before promoting said children to the second grade.

### II.

Plaintiffs complain of the following acts of the Defendant J. W. Edgar, State Commissioner of Education:

1. Providing state funds for the Defendant Driscoll Independent School District while being fully cognizant of the practices of said district as heretofore alleged.

RICHARD CASILLAS  
ALBERT PENA, JR.  
JAMES DEANDA

By  
/s/ James DeAnda  
Attorneys for Plaintiff

## REPLY TO PLAINTIFFS' CLAIMS BY DRISCOLL

TO THE HONORABLE JUDGE OF SAID COURT:

In the Plaintiffs' Complaint, as distinguished from the Statement of Plaintiffs' Claims, it was alleged that defendants have adopted a practice of excluding children of Mexican descent, solely because of said Mexican descent, from attending certain classes, that such children of Mexican descent are required to spend four years completing the work performed by other children in a period of two years, and that as a result said children of Mexican descent have suffered monetary damages and have been prevented from

receiving the educational, health, psychological and recreational benefits provided by defendants for other children. No such allegations or statements are contained in the Plaintiffs' Statement of Claims, and in truth and in fact there is no racial discrimination in the Driscoll school system. There is no separation for any reason, throughout the school system, except that in the first and second grades it is necessary to group in a separate class the students who were unable to speak English upon entering school, so that they may be taught English and be made

ready to do the regular school work, and even that grouping in the first and second grades is only within the classroom itself, and there is no separation of the students in the first and second grades or any other grade outside of the classroom doors, in the hallways, on the playgrounds, or in the cafeteria. Even in the first and second grades, all children in the same grade, whatever their racial descent may be, are housed in the same building as others in the same grade, eat in the same cafeteria at the same time as others in the same grade, and enter and sit in the cafeteria where they please, without regard to grade, classroom, or descent. All children in the same grade participate in the same manner in all recreational and group activity and are furnished the same equipment and supplies.

**Reply to Points 1 and 2 of  
the Statement of  
Plaintiffs' Claims**

Defendants make a joint reply to Points 1 and 2, because such points are identical except that one applies to the first grade and the other to the second grade.

In the first and second grades only, in the Driscoll school system, the pupils are grouped into separate school room classes by two groups, one group being children who, upon first entering school, are unable to speak the English language, and the other group being those who do speak English upon first entering school. Such grouping is determined solely by the ability or lack of ability of the individual child to speak and understand the English language. Whether the individual child is of Latin-American descent has nothing to do with such grouping. If and when there are classes consisting solely of children of Latin-American descent, such fact results solely from the fact that the only children in that grade who did not speak English upon entering school chanced to be of Latin-American descent. Defendants have no control over whether children who are first entering school in the Driscoll school district, and who cannot speak English, are of Latin-American or any other descent. The fact that it is the custom and usage of a great majority of the families and parents of children of Latin-American descent who live in the Driscoll school district, to speak only Spanish in the home and to send the children to school without the ability to speak and understand English, while on the other hand families and parents of children who are not of

Latin-American descent seem to have the custom of speaking English in the home without regard to what their mother tongue might have been, is a matter solely within the control of the plaintiffs and the classes they purport to represent.

Grouping according to ability to learn is recognized and followed in the field of education as the proper and desirable method for the benefit of the individual child. Regardless of his native intelligence, a child cannot learn the regular school work unless there can be communication between the child and the teacher. Communication in the Driscoll schools is in the English language and is required to be so by law. Under the provisions of Article 288 of the Penal Code of the State of Texas, defendants and the individual teachers would be guilty of a crime and subject to prosecution if recitations and exercises and other communication in the classroom should be conducted in any language other than English. Grouping for language reasons is therefore necessary for a sufficient length of time for the non-English-speaking children to learn English and thereby acquire the ability to learn the regular school work.

**Reply to Point 3 of the  
Statement of Plaintiffs' Claims**

Defendants do not use an educational system which requires a majority of the Latin-American children to spend three years in the first grade *because they are Latin-Americans*, and the third point of the Statement of Plaintiffs' Claims does not assert that any children are required to spend three years in the first grade because of their Latin-American descent.

Throughout all of its classes, and not just in the first grade, the Driscoll school district uses a system of promotion when the individual student is ready for the next grade, and such system applies to all students without regard to race. Readiness as a factor in promotion is a part of the recognized and approved method of grouping according to ability to learn. Ability to read is an essential element of the ability to learn, and the ability to communicate is also an essential element of the ability to learn. Communication and reading in the Driscoll school system are in the English language, and are required by law to be in the English language. Reading readiness is one of the most essential elements of ability to learn.

The great majority of the children of Latin-American descent in the Driscoll school system do not speak English when they first enter school, and it is therefore necessary that they be taught the English language before they are ready to do the regular school work in the same manner as those who speak English upon entering school. Time is required to teach them English, and therefore a great majority of those who cannot speak English upon first entering school require more time in the school than other students before becoming ready to do the work of higher grades; but such is not because of their race but is because of their English language deficiency. The principal reason why the majority of Latin-American students in the Driscoll school system require a longer period of attendance in the first grade is the failure and refusal of their parents to teach them English before entering school and to speak English in the home, coupled with the failure and refusal of the parents to require such children after entering school to speak only English in the home and during the summer vacation and to associate only with those who speak English. If the pupils who do not speak English upon first entering school hear and speak little or no English in the home and at other places after school hours during the school year, the task of the schools in teaching English is made much more difficult and lengthy. If such students speak and hear little or no English during the summer vacation period, they forget much of what they have learned in the preceding school year, and extended repetition and review become necessary.

It is for the best interests of the minor plaintiffs and others of the class they purport to represent that they not be advanced or promoted before they are ready to learn the work of the next higher grade. It is to the best interests of all pupils that those who do not speak English be grouped separately from those who do speak English, until they are ready for the third grade work; for otherwise both groups would not be able to advance as fast as they can by such grouping, if both groups receive equal time and attention.

#### Reply Applying to All Points in the Statement of Plaintiffs' Claims

Although ordered by the Court to set out *in detail* what the defendant School District

is doing or has done which the plaintiffs complain about, the plaintiffs' Statement is not one in detail. The Statement is so worded that defendants are not able to determine therefrom what position the plaintiffs are taking. By such Statement, the defendants not only are given no detailed alleged facts, but the Statement is so worded that defendants cannot be sure what questions of law might be presented. Points 1 and 2 of Plaintiffs' Statement are subject to the construction that, although the grouping is not because of race, but rather is in accordance with recognized and proper educational procedure, nevertheless, if such proper procedure chances to result in a class consisting only of children of Latin-American descent, then such proper educational procedure should be abandoned and the pupils should deliberately be grouped in a manner to insure mixing of children of different racial descent. Also, as to Point 3, the plaintiffs' one-sentence statement is subject to the construction that even though defendants' educational system as to promotion is not based on racial grounds, but rather is in accordance with proper educational procedure, nevertheless, if such proper promotional procedure chances to result in a majority of Latin-American children spending three years in the first grade, then such proper procedure should not be followed and the children of Latin-American descent should be promoted because they are of Latin-American descent.

The fact that there is no racial discrimination in the Driscoll schools, as hereinabove first set forth, coupled with the failure of the plaintiffs to set forth in their Statement any claim that there is or has been any grouping or failure to promote for racial or arbitrary reasons, leads defendants' attorneys to believe that the correct construction of the plaintiffs' Statement of Claims is as set forth in preceding paragraph of this Reply. Defendants are entitled to know, well in advance of trial, what position the plaintiffs do take, and defendants are entitled to have statements or pleadings of such a nature that defendants will know what issues are to be tried.

Defendants have refused and will continue to refuse to group and promote for racial reasons, and grouping and promotion for racial reasons designed to please those of Latin-American descent would be as unlawful and improper as would be grouping and promotion for racial reasons with a result that does not please those

of Latin-American descent. This suit has resulted solely from the insistence of certain G. I. Forum organizations and the officials thereof that defendants adopt educational procedures which defendants believe would be harmful to the children of Latin-American descent as well as the other children. Defendants say that there is no difference of opinion among unbiased experts in the field of education as to the advisability of the use of the grouping procedure followed in the Driscoll school; but defendants say that if they be mistaken and there is in fact difference of opinion among the unbiased experts in regard to such matters, then the decisions as to which school of thought should be followed can legally be made only by the officials and employees of the local school district involved, who can and should determine such matters in accordance with the local situation, and the determination of such matters should not be dictated by any group of parents or clubs or other organizations, either

with or without the aid of the courts. Defendants have the duty and power to plan the method of instruction and to so classify and group the pupils in the Driscoll school district as to bring to each one of the pupils the greatest benefits according to his or her individual needs and aptitudes, and defendants intend to perform such duties to the best of their ability, without regard to the race or descent of any student.

Respectfully presented,  
BOONE, DAVIS, COX &  
HALE  
ALLEN V. DAVIS  
OWEN D. COX

By \_\_\_\_\_  
Allen V. Davis  
ATTORNEYS FOR THE  
DEFENDANTS HEREIN  
NAMED

## EDUCATION

### Public Schools—Virginia

**Jerome A. ADKINS et al. v. The SCHOOL BOARD OF THE CITY OF NEWPORT NEWS et al.**

**Leola Pearl BECKETT et al. v. The SCHOOL BOARD OF THE CITY OF NORFOLK, Virginia, et al.**

United States District Court, Eastern District, Virginia, January 11, 1957, Civ. Nos. 489 (Newport News Div.) and 2214 (Norfolk Div.)

**SUMMARY:** In similar class actions filed in federal district court, Negro school children in Norfolk and Newport News, Virginia, sought to require school officials to admit them to public schools without discrimination on the basis of race or color. Similar motions to dismiss, on general grounds, were filed by the defendant school officials to each case and later supplemental motions to dismiss were filed. The supplemental motions were grounded on the proposition that the pupil plaintiffs had not exhausted the administrative remedies afforded them by the recently enacted Virginia "Pupil Placement Act" (Ch. 70, Va. Acts of 1956, 1 Race Rel. L. Rep. 1109). The two cases were consolidated for a hearing on the motions to dismiss. The court reviewed the legislative history of the Virginia placement act, including the prior adoption of a resolution of interposition (see 1 Race Rel. L. Rep. 445) and the announced purposes of the legislation as well as other legislation adopted at the same time. The court held the placement act to be unconstitutional on its face because it required the Pupil Placement Board to consider the race of the child in making assignments to schools. The court further stated that the remedy afforded by the act, even if not

**unconstitutional, was not an adequate remedy which the pupil would be required to exhaust before proceeding with court action. The motions to dismiss were overruled.**

HOFFMAN, District Judge.

#### MEMORANDUM

In identical class actions certain Negro children and their parents, or others who stand in loco parentis, have instituted these suits seeking the guidance and assistance of this Court to require the defendants<sup>1</sup> to cease and desist from the policy, practice, custom and usage of denying the infant plaintiffs, solely by reason of their race or color, admission to and education in any public school operated solely for children of the white race; and requiring the infant plaintiffs, solely because of their race or color, to attend public schools operated exclusively for Negro children.

In identical answers<sup>2</sup> defendants originally filed motions to dismiss the actions on the following grounds:

- (a) The School Boards allege that they are agencies of the State of Virginia and the State has not given its consent to be sued;
- (b) The Division Superintendents allege that the respective complaints fail to state a claim against them upon which relief can be granted; and
- (c) The Court lacks jurisdiction and the proceedings involve no case or controversy upon which relief should be granted.

At a pre-trial conference in the Newport News case held on the 2nd day of July, 1956, the Court took cognizance of the fact that the Governor of Virginia had declared his intention to convene the General Assembly of Virginia in Special Session not later than September 6, 1956, to enact certain legislation dealing with the problems involving public education following the decisions of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, and *Brown v. Board of Education*, 349 U.S. 294, as well as other related School Segregation Cases. An order was entered<sup>3</sup> permitting counsel for

1. In addition to the local School Boards, the respective Division Superintendents of Schools are named as parties defendant in each case.
2. It is unnecessary to set forth the averments, admissions or denials of the answers as the matter is now before the Court on defendants' motions to dismiss.
3. A similar order was thereafter entered in the Norfolk case.

all parties to file such additional pleadings and such amendments of pleadings as counsel desired; the filing date to be within twenty (20) days after the enactment of any public school legislation by the General Assembly of Virginia, regardless of the effective date of such law.

#### [Supplemental Motions]

Within the time specified by the Court's order, defendants filed supplemental motions to dismiss which are identical in each case. The basis of the supplemental motions is that the plaintiffs have not exhausted the administrative remedies allegedly afforded them by Chapter 70 of the Acts of Assembly for the Extra Session of 1956. On November 17, 1956, the Court heard extensive arguments<sup>4</sup> in both cases on the motions to dismiss. In short, plaintiffs concede that they have not attempted to exhaust the alleged administrative remedies provided under the aforementioned Chapter 70; nor do they intend to do so as it is their contention that Chapter 70 is unconstitutional *on its face* as contrasted with being unconstitutional in its application. While the Act which is the subject matter of this controversy did not become effective until December 28, 1956, counsel agreed that the argument on November 17, 1956, would be treated as though the Act was effective, and the Court would defer its decision until subsequent to the effective date of the new law.

#### [Other Issues Settled]

As to the issues raised in the original motions to dismiss, these matters are concluded by the opinion of the United States Court of Appeals for the Fourth Circuit in the Charlottesville and Arlington school cases<sup>5</sup> on appeals from District Judges Paul and Bryan respectively. Nothing need be added thereto as counsel concede that this opinion is binding upon this Court.

The two remaining questions for this Court's determination are:

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4. Argument of counsel consumed nearly five (5) hours and has been transcribed.
  5. The School Board of the City of Charlottesville, et al v. Doris Marie Allen, et al (Record No. 7303), and County School Board of Arlington County, Virginia, et al v. Clarissa S. Thompson, et al (Record No. 7310), decided December 31, 1956.

- (1) Are the new school laws of Virginia, and particularly the aforementioned Chapter 70, unconstitutional on their face?
- (2) Is a three-judge court required by law to decide the constitutional question raised by the defendants' supplemental motions to dismiss?

**THE CONSTITUTIONALITY OF THE  
PUPIL PLACEMENT ACT AS PROVIDED  
BY CHAPTER 70, ACTS OF ASSEMBLY,  
EXTRA SESSION OF 1956.**

It is a well-settled principle of law that legislation enacted carries with it a presumption of constitutionality. There are, however, certain limitations on the application of this rule as stated in *Ex parte Endo*, 323 U.S. 283, 299, where it is said that the Supreme Court "has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific provision of the Constitution." And in *Korematsu v. United States*, 323 U.S. 214, 216, appears this language:

"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."

Counsel for the respective School Boards concede that this Court is obliged to follow the rulings of the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit. It does not lie within the purview of a District Judge to alter or amend these decisions irrespective of the wisdom of the same—that remedy rests in the highest court of the nation or in a constitutional amendment.

**[Legislative Purpose and Intent]**

Equally well-settled is the principle that, in determining the constitutionality of legislation, a court should examine the legislative history of same to ascertain the legislative purpose and intent, and that acts *in pari materia* should be construed together.<sup>6</sup> Statutes having the same

general purpose, relating to the same class of subjects, constituting parts of the same general plan, and aimed at the accomplishment of the same results, are all considered together.<sup>7</sup> It is significant that the Supreme Court of Appeals of Virginia has consistently adhered to this doctrine and it is largely immaterial in determining whether the legislation was passed at the same session, or at an earlier date without reference to the statute *in pari materia*.<sup>8</sup> Similarly, reports of legislative committees and pertinent resolutions, while not binding upon the Court, may be examined to ascertain the legislative intent in enacting the laws under attack.<sup>9</sup>

With these uncontested principles in mind the Court is duty bound to review the forerunners and objectives leading to the enactment of Chapter 70 (referred to as the Pupil Placement Act) by the Special Session of the General Assembly of Virginia in September, 1956.

**[Gray Commission Formed]**

Following the first decision of the United States Supreme Court in *Brown v. Board of Education*, *supra*, decided May 17, 1954, the Governor of Virginia, on August 30, 1954, created and appointed a legislative commission, known as the Virginia Commission on Public Education, consisting of thirty-two (32) members of the General Assembly, with instructions to make appropriate recommendations. After a period of slightly more than fourteen (14) months, it submitted its report to the Governor in what is generally referred to as the "Gray Report," named for the Chairman of the Commission. In substance, the Commission expressed its views that separate facilities in public schools were for the best interest of both races and recommended the enactment of a pupil assignment program permitting local school boards to assign pupils in such manner as would best serve the welfare of their communities and protect and foster the public schools in the localities in question. It further recommended that no child be required to attend a school wherein both white

7. *Seaboard Finance Corp. v. Commonwealth*, 85 Va. 280, 38 S.E. (2d) 770; *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516; *Soble v. Herman*, *supra*; *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374.

8. *Mitchell v. Witt*, 98 Va. 459, 36 S.E. 528.  
9. *Wright v. Vinton Mountain Trust Bank*, 300 U.S. 440; *McFeeley v. Commissioner of Internal Revenue*, 296 U.S. 202; *Boyer-Campbell Co. v. Fry*, 271 Mich. 221, 260 N.W. 165, 98 A.L.R. 827.

6. *United States v. Stewart*, 311 U.S. 60; *Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39; *Joy v. Green*, 194 Va. 1003, 76 S.E. (2d) 178; *Soble v. Herman*, 175 Va. 489, 9 S.E. (2d) 459.

and colored children are taught, and suggested tuition grants for parents of children who objected to integrated schools, or who lived in communities wherein no public schools are operated. In further discussing its proposal the "Gray Commission" said:

"Such legislation would be designed to give localities broad discretion in the assignment of pupils in the public schools.

"Assignments would be based upon the welfare of the particular child as well as the welfare and best interests of all other pupils attending a particular school. The school board should be authorized to take into consideration such factors as availability of facilities, health, aptitude of the child and the availability of transportation.

"Children who have heretofore attended a particular public school would not be reassigned to a different one except for good cause shown. A child who has not previously attended a public school or whose residence has changed, would be assigned as aforesaid."

[*Resolution of Interposition*]

As the "Gray Report" was submitted to the Governor on November 11, 1955, the General Assembly of Virginia concluded that insufficient time remained to consider the "Gray Report" in detail at the 1956 Regular Session convening early in January. Certain resolutions were, however, presented and adopted, including Senate Joint Resolution No. 3 generally referred to as the "Interposition Resolution." Without quoting verbatim the resolution under consideration it is sufficient to state that it urges the adoption of a constitutional amendment "to settle the issue of contested power" between State and Federal Governments. The preamble to the resolution and the final paragraph thereof are, to a limited extent, significant, where it is said in the preamble:

" . . . Recognizing, as this Assembly does, the prospect of incalculable harm to the public schools of this State and the disruption of the education of her children, Virginia is in duty bound to interpose against these most serious consequences, and earnestly to challenge the usurped authority that would inflict them upon her citizens."

And in the final paragraph:

"And be it finally resolved, that until the question here asserted by the State of Virginia be settled by clear Constitutional amendment, we pledge our firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers, and to urge upon our sister States, whose authority over their own most cherished powers may next be imperiled, their prompt and deliberate efforts to check this and further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the States."

It was, of course, within the prerogative of the General Assembly to adopt this and any other resolution<sup>10</sup> but the distinguished members of this body (many of whom are able attorneys) must recognize that such proclamations may have some bearing upon the questions of intent in arriving at a determination of the constitutionality of any laws subsequently enacted. The passage of the resolutions to which reference has been made is not, however, determinative of the final issues in these cases now pending.

[*Governor's Remarks*]

On August 27, 1956, the Governor of Virginia addressed the General Assembly at its Special Session convened for the purpose of considering educational matters. Included in his remarks are the following comments:

"The people of Virginia and their elected representatives, are confronted with the gravest problems since 1865. Beginning with the decision of the Supreme Court of the United States on May 17, 1954, there has been a series of events striking at the very fundamentals of constitutional government and creating situations of the utmost concern to all of our people in this Commonwealth, and throughout the South.

"Because of the events I have just mentioned, I come before you today for the pur-

10. The 1956 Regular Session likewise adopted House Joint Resolution No. 97, referred to as the "Pope Resolution", declaring the public policy of Virginia to be opposed to athletic teams of any public free school engaging in contests within the State of Virginia with other teams on which persons of the white and colored races are members.

pose of submitting recommendations to continue our system of segregated public schools.

.....  
 "We have an excellent system of public schools in Virginia, for both white and Negro pupils. We have invested many millions of dollars in it and have vastly increased appropriations, both state and local, for its maintenance and operation. We have done this because we realize the importance of education to all our citizens. We want to preserve this system and the opportunities it offers, without discrimination to members of all races. We are convinced that it can be preserved and operated as an efficient statewide system only by segregation of the races. We likewise are satisfied that we are within our rights, historically and legally, in taking every honorable and constitutional step to retain control and jurisdiction over this cherished system of public education. Our position was confirmed and encouraged by every decision of the Supreme Court of the United States over a period of nearly sixty years, prior to 1954.

"... Manifestly, integration of the races would make impossible the operation of an efficient system. By this proposed legislation, the General Assembly, properly exercising its authority under the Constitution, will clearly define what constitutes an efficient system for which State appropriations are made.

"The proposed legislation recognizes the fact that this is the time for a decisive and clear answer to these questions:

"(1) Do we accept the attempt of the Supreme Court of the United States, without constitutional or any other legal basis, to usurp the rights of the States and dictate the administration of our internal affairs?  
 (2) Do we accept integration? (3) Do we want to permit the destruction of our schools by permitting 'a little integration' and witness its subsequent sure and certain insidious spread throughout the Commonwealth? My answer is a positive 'No'. On the other hand, shall we take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers? My answer is a definite 'Yes', and I believe it to be the answer of the vast majority of the

white people of Virginia, as well as the answer of a large, if unknown, number of Negro citizens."

Manifestly, the Governor of Virginia has suggested that there shall be "no integration" of races in the public schools of Virginia, irrespective of how slight it may be. The question remains: Has Virginia now enacted a constitutional act which is non-discriminatory in nature, and hence not in violation of the Fourteenth Amendment to the Constitution of the United States as interpreted by the United States Supreme Court in the School Segregation Cases which counsel for the defendants, including the able Attorney General of Virginia, admit are binding upon this Court? In compliance with my oath of office and my duty to determine matters from a legalistic viewpoint in accordance with the decisions of the appellate courts, I must answer this question in the negative as it is my firm conviction that Chapter 70, known as the Pupil Placement Plan, is unconstitutional on its face. The legislation is directly in the teeth of the language of the Supreme Court in *Brown*, *supra*, where it is declared "the fundamental principle that racial discrimination in public education is unconstitutional," and "all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."

#### [Exhaustion Rule]

Certainly in the Fourth Circuit it is now the law that plaintiffs in this type of action must exhaust their administrative remedies before seeking relief in the federal courts. *Carson v. Board of Education*, 4 Cir., 227 F.2d 789; *Hood v. Board of Trustees*, 4 Cir., 232 F.2d 626; *Carson v. Warlick*, District Judge, 4 Cir., \_\_\_\_ F.2d \_\_\_\_ (decided November 14, 1956); *Robinson v. Board of Education*, D.C.Md., 143 F.Supp. 481; *The School Board of the City of Charlottesville v. Allen*, 4 Cir., \_\_\_\_ F.2d \_\_\_\_ (decided December 31, 1956). But *Carson v. Warlick*, *supra*, and the Charlottesville and Arlington school cases point out that the *administrative remedy must be adequate*, and *Carson* refers to *Lane v. Wilson*, 307 U.S. 268, where it is suggested that certain so-called administrative remedies nullify "sophisticated as well as simple-minded modes of discrimination." Is the alleged administrative remedy adequate on its face or is it, as the Court concludes, in truth and in fact an "administrative block"? Let us now review the proceedings of

the 1956 Extra Session to ascertain whether any adequate administrative remedy appears therein.

[*Appropriation Act*]

The General Assembly amended and reenacted the Appropriations Act, previously approved March 31, 1956, to provide that the sums appropriated in Items 133, 134, 137, 138 and 143 would be solely for the maintenance of an *efficient* system of elementary and secondary schools, and prohibiting the expenditure of any of the funds appropriated by such items in support of any system of public schools which is not *efficient*.<sup>11</sup> It will be noted by reference to the items involved that the key word is "efficient." Following the amendment to Item 143 will be found a statement of policy which clearly establishes the intent of the General Assembly of Virginia in these words:

"The General Assembly declares, finds and establishes as a fact that the mixing of white and colored children in any elementary or secondary public school within any county, city or town of the Commonwealth constitutes a clear and present danger affecting and endangering the health and welfare of the children and citizens residing in such county, city or town, and that no efficient system of elementary and secondary public schools can be maintained in any county, city or town in which white and colored

children are taught in any such school located therein.

"An efficient system of elementary public schools means and shall be only that system within each county, city or town in which no elementary school consists of a student body in which white and colored children are taught.

"An efficient system of secondary public schools means and shall be only that system within each county, city or town in which no secondary school consists of a student body in which white and colored children are taught.

"The General Assembly, for the purpose of protecting the health and welfare of the people and in order to preserve and maintain an efficient system of public elementary and secondary schools, hereby declares and establishes it to be the policy of this Commonwealth that no public elementary or secondary schools in which white and colored children are mixed and taught shall be entitled to or shall receive any funds from the State Treasury for their operation, and, to that end, forbids and prohibits the expenditure of any part of the funds appropriated by Items 133, 134, 137, 138 and 143 of this section for the establishment and maintenance of any system of public elementary or secondary schools, which is not efficient.

"The appropriations made by Items 133, 134, 137, 138 and 143 of this section shall be deemed to be appropriated separately to the counties and cities and the funds made available and apportioned to the counties and cities severally and separately by the Department of Education and the State Board of Education shall be separately subject to the limitations imposed in this section for their use, which limitations and a strict observance thereof shall be a condition precedent to their use. "For the purposes of this section and all other applicable laws, the public schools of the counties, cities and towns shall consist of two separate classes, namely, elementary and secondary schools.

"Notwithstanding any other provisions of this Chapter or the provisions of any other law, whenever the student body in any elementary or secondary public school shall consist of both white and colored

11. Underlined [*Italicized*] words reveal the amendment.
- (a) Item 133 appropriates \$698,000 for each year of the Biennium "for the establishment and maintenance of local supervision of instruction in *efficient* elementary and *secondary* schools, including visiting teachers, to be apportioned among such schools by the State Board of Education".
  - (b) Item 134 appropriates \$34,342,000 and \$37,-882,000 for the respective years of the Biennium "for basic appropriation for *salaries of teachers employed only in efficient elementary and secondary schools*".
  - (c) Item 137 appropriates \$7,079,680 and \$9,174,-625 for the respective years of the Biennium "for salary equalization of *teachers employed only in efficient elementary and secondary schools*".
  - (d) Item 138 appropriates \$6,240,090 and \$8,-536,400 for the respective years of the Biennium "for providing a minimum educational program in *efficient elementary and secondary schools only*".
  - (e) Item 143 appropriates \$4,895,145 and \$5,035,-145 for the respective years of the Biennium "for pupil transportation to and from *efficient elementary and secondary schools only*".

children, the Department of Education, the State Board of Education, the State Comptroller, the State Treasurer, local school board, local treasurer, and any officer of the State or of any county or city who has power to distribute or expend any of the funds appropriated by Items 133, 134, 137, 138 and 143, each severally and collectively, are directed and commanded to refrain immediately from paying, allocating, transferring or in any manner making available to any county, city or town in which such school is located any part of the funds appropriated in Items 133, 134, 137, 138 and 143 for the maintenance of any public school of the class of the school in which white and colored children are taught. Whenever it is made to appear to the Governor, and he so certifies to the Department of Education, that all such schools of such class within any such county, city or town can be maintained and operated without white and colored children being mixed or taught therein, the funds appropriated in Items 133, 134, 137, 138 and 143 to such county or city shall be made available, subject to the limitations contained herein and only for such period of time as it is made to appear to the Governor that there is no school of that class being operated in such county, city or town, in which white and colored children are mixed and taught; provided that all the limitations herein contained shall again be effective immediately whenever it appears that any children are being mixed and taught in any public school of the class involved.

"It is provided that the limitations herein set forth shall not prohibit the release and distribution of the funds apportioned and allocated, or any unexpended part thereof, to which any county, city or town would otherwise be entitled, to such county, city or town for the payment of salaries and wages of unemployed teachers in State aid teaching positions, and other public school employees, who are under contract and for educational purposes which may be expended in furtherance of elementary and secondary education of Virginia students in nonsectarian private schools, as may be provided by law."

Thus it follows, as a matter of law, that whenever the student body of any elementary or secondary school shall consist of both white and colored children, whether placed there by the Pupil Placement Board or pursuant to a court order, the funds appropriated under the five numbered items shall terminate as to *all* schools of the same class in that particular county, city or town. For the first year of the Biennium the aggregate of the funds provided in the five items is \$53,254,915 out of a total budget of \$60,560,210; for the second year the aggregate is \$59,326,170 out of a total budget of \$67,076,205. It is argued that the county, city or town so affected would still have available approximately \$7,500,000 for each year of the Biennium, but counsel have overlooked the fact that the other items must be pro-rated between all counties, cities and towns throughout the State. Additionally, there are many of the remaining items payable for state administration or otherwise apportioned under rules and regulations of the State Board of Education with the approval of the Governor. Only such items as vocational education and industrial rehabilitation will not materially suffer. While it is true that there are other funds apportioned and returned to the localities, this would be a mere pittance to what is required to operate the public schools of any community. It follows that the General Assembly has substantially cut off all funds for school appropriation at the state level for any class of schools in the entire locality, in the event any white and colored children are permitted to attend the same school.

[*Pupil Placement Act*]

With this background the General Assembly proceeded to enact the Pupil Placement Act,<sup>12</sup>

12. The pertinent provisions of Chapter 70 (Pupil Placement Act) are as follows:

"§1. All power of enrollment or placement of pupils in and determination of school attendance districts for the public schools in Virginia is hereby vested in a Pupil Placement Board as herein-after provided for. The local school boards and division superintendents are hereby divested of all authority now or at any future time to determine the school to which any child shall be admitted. The Pupil Placement Board is hereby empowered to adopt rules and regulations for such enrollment of pupils as are not inconsistent with the provisions hereinafter set forth. Such rules and regulations shall not be subject to Chapter 1.1 of Title 9 of the Code of Virginia, the short title of which is "General Administrative Agencies Act". The Pupil Placement Board and any of its agents

the constitutionality of which is the subject of this memorandum. The practical operation of this Act is unique, to say the least. At the outset it is necessary to consider the language of §4 which has the effect of "freezing" any child in

hereinafter provided for shall have authority to administer oaths to those who appear before said Board or any of its agents in connection with the administration of this act.

"§2. The Pupil Placement Board may designate, appoint and employ such agents as it may deem desirable and necessary in the administration of this act. It may authorize such agents to hold the hearings hereinafter provided for and take testimony and submit recommendations in any and all cases referred to them by said Board.

"§2a. For the conduct of such hearings and to facilitate the performance of the duties imposed upon it and its agents under this act, the Pupil Placement Board is authorized to promulgate all such rules and regulations and procedures and prescribe such uniform forms as it deems appropriate and needful and to require strict compliance with the same by all persons concerned.

"§3. The Pupil Placement Board in enrolling each pupil in a school in each school district shall take into consideration:

- (1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the efficiency of the operation of said school.
- (2) The health of the child as compared to other children in the school.
- (3) The effect of any disparity between the physical and mental ages of any child to be enrolled especially when contrasted with the average physical and mental ages of the group with which the child might be placed.
- (4) Availability of facilities.
- (5) The aptitude of the child.
- (6) Availability of transportation.
- (7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils.
- (8) Such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

"§4. After the effective date of this act, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled, for good cause shown, in a different school by the Pupil Placement Board.

"§5. Any child who desires to enter a public school for the first time following the effective date of this act, and any child who is graduated from one school to another within a school division or who transfers to a school division, or any child who desires to enter a public

school now attended until graduation therefrom "unless enrolled, *for good cause shown*, in a different school by the Pupil Placement Board" consisting of three members appointed by the

school after the opening of the session, shall apply to the Pupil Placement Board for enrollment in such form as it may prescribe, and shall be enrolled in such school as the Board deems proper under the provisions of this act. Such application shall be made on behalf of the child by his parent, guardian or other person having custody of the child.

"§6. Both parents, if living, or the parent or guardian of a pupil in any school in which a child is enrolled by action of the Pupil Placement Board, if aggrieved by an action of the Board, may file with the Board a protest in writing within fifteen days after the placement of such pupil. Upon receipt of such protest the Board shall hold or cause to be held a hearing, within not more than thirty days, to consider the protest and at the hearing shall receive the testimony of witnesses and exhibits filed by such parents, guardians or other persons, and shall hear such other testimony and consider such other exhibits as the Board shall deem proper. The Board shall consider and decide each individual case separately on its merits. The Board shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the city or county wherein the aggrieved party or parties reside. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter and the time and place of the hearing. The Board shall, within not more than thirty days after the hearing, file in writing its decision, enrolling such pupil in the school originally designated or in such other school as it shall deem proper. The written decision of the Board shall set forth the findings upon which the decision is based. Any parent, guardian or other person having custody of any child in the particular school in which a child is enrolled by action of the Board shall be deemed an interested party and shall have the right to intervene in such proceeding in furtherance of his interest.

"§6a. Any parties aggrieved by a decision of the Pupil Placement Board under this act, or any party defined as an interested party in §6 may obtain a review of such decision by filing an application in writing for a review thereof with the Governor within fifteen days after such decision. Such application shall be by a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Pupil Placement Board, together with statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Pupil Placement Board and a transcript of the proceedings before the Pupil Placement Board, which shall be furnished to the petitioner by the Pupil Placement Board within ten days after request therefor upon payment of the costs of such transcript by the petitioner. Upon the filing of a petition for a review with the Governor, the Governor shall set the same for a hearing and within fifteen days after the pe-

Governor.<sup>13</sup> The Attorney General, at the time of oral argument, stated that if any child could establish to the satisfaction of the Board that he was being deprived of attending any school by reason of race or color, this would be "good cause" in and of itself. Whether this interpretation of §4 would be binding upon the Pupil Placement Board, or any successor Attorney General, is problematical. Plaintiffs answer this argument by stating that, after considering the provisions of §3 as well as the legislative declarations in the Appropriation Act, the statement of the Attorney General may well be doubted and, in any event, such considerations are calculated to substantially impair the free exercise of any discretion the Board may have in the matter.

As to children attending school for the first time, or children transferring to another school division, or graduating from one class of school to another, such child is required to apply to the

tition has been filed with him, he shall file, in writing, his decision, enrolling such pupil in the school originally designated or in such other school as he shall deem proper. The written decisions of the Governor shall set forth the findings upon which his decision is based.

"§7. Any party aggrieved by a decision of the Governor under this act or any party defined as an interested party in §6 may obtain a review of such decision by filing in the clerk's office of the circuit court of the county or corporation court of the city in the jurisdiction of which such party resides, within fifteen days after such decision, a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Governor, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Governor and a transcript of the proceedings before the Governor, which shall be furnished to the petitioner by the Governor within ten days after request therefor upon payment of the costs of such transcript by the petitioner.

"§7a. Any interested party, as defined in §6 may, by petition, intervene for the purpose of making known and supporting his interest, in any proceeding for review of the Pupil Placement Board's decision instituted by an aggrieved party or by another interested party; and the court having jurisdiction of such review proceedings shall hear the evidence of as many interested parties, as defined in §6, in any such review proceeding, as in its discretion it may deem proper, whether or not such interested parties shall have petitioned for such review or petitioned to intervene therein.

"§8. Upon the filing of the petition the clerk of the court shall forthwith notify the Pupil Placement Board, requiring it to answer the statements contained in the application within

Pupil Placement Board and is thereafter enrolled "in such school as the Board deems proper under the provisions of this Act."

[*Standards to be Applied*]

It is abundantly clear that the Board, in acting upon the application, must apply the standards prescribed under §3 of Chapter 70. That section requires the Board to consider certain factors, among them being:

- (1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as

twenty-one days, but failure to do so shall not be taken as an admission of the truth of the facts and allegations set forth therein. The clerk of the court shall publish a notice of the filing of such application once a week for two successive weeks in a newspaper of general circulation in the county or city for which the court sits and shall, in addition, post the same at the door of the courthouse. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter, and shall set forth the time and place for the hearing. The proceedings shall be matured for hearing upon expiration of twenty-one days from the issuance of the notice to the Pupil Placement Board by the clerk of the court and heard and determined by the judge of such court, either in term or vacation.

"§9. The findings of fact of the Pupil Placement Board shall be considered final, if supported by substantial evidence on the record.

"§10. From the final order of the court an appeal may be taken by the aggrieved party or any interested party, as defined in §6, to the Supreme Court of Appeals as an appeal of right, in the same manner as appeals of right are taken from the State Corporation Commission.

"§10a. An injunction proceeding may be brought in any State court of competent jurisdiction by the Commonwealth, or by any interested party as defined in §6, for the purpose of restraining the performance of any act, or any intended or threatened act, which may be in evasion of, in disregard of, or at variance with, any of the foregoing provisions.

"§11. Neither the Pupil Placement Board nor its agents shall be answerable to a charge of libel, slander or insulting words, whether criminal or civil, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statement made during the proceedings or deliberations."

13. The three members of the Pupil Placement Board have, since the date of argument, been appointed by the Governor. They are residents of Danville, Nansemond County and Richmond. There is a serious question as to their authority to delegate their duties in considering routine applications for enrollment or transfer despite the provisions of §2 and §2a.

- well as the effect on the *efficiency* of the operation of said school;
- (2) The health of the child as compared to other children in the school;
  - (6) Availability of transportation;
  - (7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils;
  - (8) Such other relevant matters as may be pertinent to the *efficient* operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

The Pupil Placement Act was approved on September 29, 1956, which is the same date on which the Appropriations Act (Chapter 71) was amended and reenacted wherein the General Assembly made its declaration of policy and defined an "efficient" system of public schools. Under such a declared policy and definition the Pupil Placement Board would indeed be derelict in its duty if it ever permitted admission of a Negro child in a school heretofore reserved for white children, and vice versa. Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body.

#### [Definition of "Efficient"]

The Attorney General argues that the Legislature has provided "a plain and simple path for any parent aggrieved, white or colored, to take it (the application) up." With this statement the Court must respectfully disagree. By § 129 of the Constitution of Virginia, the General Assembly is required to establish and maintain an efficient system of public schools throughout the State. That this provision is mandatory cannot be doubted under the decision of School Board of Carroll County v. Shockley, 160 Va. 405, 168 S.E. 419<sup>14</sup>. The word "efficient" has not heretofore been defined by the Legislature or by the courts of Virginia. Suddenly, for the

14. While not here necessary to decide, the Shockley case, *supra*, casts doubt upon the constitutionality of §10 of Chapter 68 (hereinafter discussed), as §138 of the Constitution of Virginia limits the right of each county, city or town to levy taxes on property "not to exceed in the aggregate in any

first time since the adoption of the Constitution of Virginia and significantly enough at a session of the General Assembly convened for the purpose of considering educational matters, the Legislature defines the word "efficient" in the Appropriations Act, and in Chapter 67, so as to exclude any school system wherein both white and colored children are in attendance. When we turn to the Pupil Placement Act and the use of the word "efficient" under § 3(1) and § 3(8), it would indeed be charitable to assume that the General Assembly had in mind varying interpretations of this word.

Assuming arguendo that a child is not barred under the provisions of § 4, and that the word "efficient" as used in § 3(8) has no reference to the definition placed thereon by the terms of the Appropriations Act, the cumbersome procedure approved by the Legislature falls far short of meeting the test of an *adequate* administrative remedy. The procedure for a child already in school, who desires to attend another school, is not specified. Presumably the child would make application for a change under § 5 through his parent, guardian, or other person having custody of the child. After the child has been placed in a particular school by the Pupil Placement Board, both parents, if living, or the parent or guardian of such child, may file a written protest with the Board, within fifteen (15) days after the date of placement. The Board then conducts a hearing within thirty (30) days of the receipt of the written protest, after first giving notice of the hearing by newspaper publication once a week for two successive weeks. § 6 makes the parent, guardian, etc., of any child in the particular school in which a child is enrolled by action of the Board, an interested party with the right of intervention. Thus, if child "A" desires to attend school "B", having a student body of 2000 pupils, there could be 4000 intervenors in that particular case, each of whom apparently has a legal right to be heard. Thirty (30) days after the hearing

one year a rate of levy to be fixed by law". The problem facing any county, city or town is indeed difficult despite the provisions of Chapter 57, adopted September 29, 1956. Furthermore, in the Shockley case, the Court said: "Under the law the school board not only has the authority, but it is its duty, to protect the school revenues by proper legal action, whenever threatened with loss or detriment from any cause." The cut-off provisions of Chapter 71 certainly constitute a threatened loss to the localities considering the status of the taxpayers in that political subdivision.

(which must be interpreted to mean the termination thereof), the Board files its decision in writing, "enrolling such pupil in the school originally designated or in such other school as it shall deem proper", and the Board is further required to set forth the findings upon which the decision is based. Presumably these findings would be predicated upon the factors specified in § 3.

[*Review Procedure*]

Any party aggrieved by the decision of the Pupil Placement Board, including any intervenor parent, etc., may file a written application for a review by the Governor. Such application for review must be filed within fifteen (15) days after the Board's decision. Accompanying the petition for review is required a transcript of the proceedings before the Board, same to be provided within ten (10) days after request and upon payment of costs of such transcript by the petitioner<sup>15</sup>. The Governor is required to hear the review and file his decision in writing within fifteen (15) days after the petition is filed with him.

Any party, including the parents of children in the schools affected, may, if aggrieved by the action of the Governor, file a petition in an appropriate state court within fifteen (15) days of the Governor's decision<sup>16</sup>. The case is thereafter matured at the expiration of twenty-one (21) days after issuance of notice by the Clerk to the Pupil Placement Board. An appeal of right to the Supreme Court of Appeals of Virginia is provided. It is hardly necessary to discuss any possible court proceedings as the so-called administrative remedy terminates with the decision of the Governor and any person who asserted the violation of the constitutional rights afforded by the Fourteenth Amendment could then seek relief in the federal courts.

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- 15. The Act also requires, on review of the Governor's decision, the preparation of a transcript of proceedings before the Governor as a condition precedent to a review by the state court. The costs of these transcripts could indeed be burdensome and the ability to supply same within ten (10) days may be impossible by reason of the right granted to all parents to intervene and the volume of testimony to be transcribed.
  - 16. No provision is made for hearing the review by any party other than the Governor. §2 provides for the appointment of agents by the Board for the purpose of holding hearings and making recommendations. But the Act apparently contemplates a personal hearing by the Governor.

*Carson v. Warlick*, *supra*. It is, however, important to consider the time consumed by court review as to parents of children (other than the original petitioner) for the reason that no constitutional rights would there be involved. It is also noted that, under the provisions of § 9, the findings of fact of the Pupil Placement Board are considered *final*, if supported by substantial evidence on the record.

[*Time Required*]

It thus appears that the so-called administrative remedy will consume 105 days until final decision by the Governor. A child seeking relief from the original designation of enrollment at the commencement of a school term in September could not, with any degree of confidence, anticipate a decision through administrative channels until the middle of December. His court action thereafter filed, either in the state or federal court, would not mature until the completion of his grade upon which he is then in attendance. This presents the serious question as to whether this child will not then be required to proceed anew as he will presumably have been advanced to a higher grade. While the Attorney General conceded in oral argument that such an interpretation would render Chapter 70 nugatory and unconstitutional, it is certainly a debatable point and lends strength to the contention that the Act is unconstitutional on its face. As was said in *Lane v. Wilson*, *supra*, "it hits onerous procedural requirements which effectively handicap" the rights of those seeking the protection of the Fourteenth Amendment.

[*Closing of Schools*]

When the provisions of Chapter 68, approved contemporaneously with Chapter 70, are examined, it is manifest that the language of Chief Judge Parker in *The School Board of the City of Charlottesville v. Allen*, *supra*, is appropriate wherein he said, "*Equity does not require the doing of a vain thing as a condition of relief*". Under Chapter 68, if the Pupil Placement Board enrolls any Negro child in a school in which white children are already enrolled, or vice versa; or should the Governor, despite his emphatic statement that he will at no time permit "a little integration", act in a similar manner; or should any court enter any order directing the enrollment of a Negro child in any school in which white children are already enrolled

or vice versa; it is provided that "such school is closed and is removed from the public school system". The school remains closed until the Governor, after an investigation, finds and issues an executive order stating "(1) The peace and tranquility of the community in which the school is located will not be disturbed by such school being reopened and operated, and (2) the assignment of pupils to such school could be accomplished without enforced or compulsory integration of the races therein contrary to the wishes of any child enrolled therein, or of his or her parent or parents, lawful guardian or other custodian"<sup>17</sup>. Not only is the particular school closed, but defendants concede that all schools of the same class within the particular political subdivision will also close by operation of law. For example, if one Negro child is admitted into an elementary school in the City of Norfolk wherein white children are already enrolled, then *all* elementary schools in the City of Norfolk are automatically closed. This is the "adequate administrative remedy" which defendants will have this Court construe to be constitutional on its face.

Defendants urge that § 10 of Chapter 68 furnishes the loophole of protection as to constitutionality. It reads:

"Notwithstanding any other provision contained in this act, if after investigation the Governor concludes, or, at any time the school board or board of supervisors of the county or the council of the city in which the closed school is located, certifies to the Governor by resolution that in it or their opinion such school cannot be reopened, or reorganized and reopened, in conformity with provisions of this act, the Governor shall so proclaim, in which event the said school shall again become a part of the public school system of the political subdivision in which it is located, and such school, elementary or secondary, shall along with all other schools of its class in the political subdivision in which it is located thereby become subject to the applicable provisions of the laws of this State."

17. This provision of §4 of Chapter 68 carries into effect the legislative act set forth in Chapter 59, approved September 29, 1956, which reads: "Notwithstanding any other provision of law, no child shall be required to enroll in or attend any school wherein both white and colored children are enrolled".

The so-called "adequate administrative remedy" inevitably leads to the closing of all public schools of the same class in the political subdivision affected. It is true that, subject to its ability to finance the same because of the cut-off provisions of Chapter 71 (the Appropriations Act), a political subdivision may, at its own option, then elect to operate this class of schools with both white and colored children in attendance, but even this provision does not answer Chapter 59 providing that no child shall be required to enroll in or attend any school wherein both white and colored children are enrolled. And defendants further contend that even if the political subdivision operated a certain class of schools under such conditions, the provisions of Chapter 70 relating to the Pupil Placement Board would still be applicable<sup>18</sup>.

#### [Laws of Other States]

There is nothing in *Hood v. Board of Trustees*, *supra*, and *Carson v. Warlick*, *supra*, to support the defendants' view that the recently enacted laws of Virginia are, by inference, constitutional on their face. The brief *per curiam* opinion in *Hood* does not discuss the constitutionality of the South Carolina statutes, and we are without the benefit of any historical background touching same. It is true that under § 21-2 of the Code of Laws of South Carolina this state has provided for the cut-off of public funds as to any school from which, and for any school to which, any pupil may transfer pursuant to, or in consequence of, *an order of any court*, for such time that the pupil shall attend a school other than the school to which he was assigned before the issuance of such court order. Neither the Circuit Court of Appeals in *Hood*, nor this Court in the present controversy, is presently faced with the constitutionality of the cut-off provisions as contained in either of the recently enacted South Carolina or Virginia laws. One striking distinction appears to exist on its face in considering the laws of these two states. South Carolina has only provided for the cut-off of funds *in the event of a court order* and has not decreed the actual closing of any school under any circumstances, whereas Virginia took the additional fatal step of providing for the automatic closing of all schools of the same class in the particular

18. At the time of oral argument, one of counsel for defendants indicated to the contrary, but later all counsel for defendants stated that Chapter 70 would apply in any event.

political subdivision as well as the cut-off of funds for such schools, *irrespective of whether any child was assigned to another school pursuant to an administrative remedy or court order.* In so doing, Virginia has exhausted the administrative remedy prior to the commencement thereof.

Other recent provisions of the Code of Laws of South Carolina, while not deemed pertinent for the discussion herein, are: § 21-46; § 21-103; § 21-247; § 21-247.1; § 21-247.2; § 21-247.3; § 21-247.4; § 21-247.5; § 21-247.6; § 21-247.7; § 21-230; and Act No. 712 of the General and Permanent Laws of South Carolina, 1956, approved March 16, 1956. It is sufficient to state that, from a procedural standpoint, the administrative remedy afforded in South Carolina is far less complicated, less time-consuming and less expensive, than Virginia has seen fit to accord to its citizens.

In *Carson v. Warlick*, *supra*, the appellate court has held that the Pupil Placement Act of North Carolina is not unconstitutional on its face<sup>19</sup>. North Carolina has not provided for either the automatic closing of any school or the cut-off of state or local funds. Obviously the remedies afforded by North Carolina do not lead to a complete "blind alley" such as Virginia has prescribed.

#### [Other Virginia Legislation]

While there are other questions as to the constitutionality of other acts relating to school problems and enacted by the General Assembly of Virginia at its Extra Session 1956, this Court need only deal with Chapter 70, which must be read in light of the related acts, resolutions, and proclamations. It is the opinion of this Court that Chapter 70, as approved September 29, 1956, is unconstitutional on its face and must be disregarded for the further purposes of these cases. The United States Supreme Court has said in the second Brown case that good faith implementation of the governing constitutional principles is the proper test for courts to consider. Despite efforts to do so, this Court is

19. All of the recent laws of North Carolina relating to the subject matter may be found in the General Statutes of North Carolina, §115-176, §115-177, §115-178, §115-179. It should be noted that the Circuit Court of Appeals has not passed upon the constitutionality of certain acts passed at the 1956 Extra Session Laws of the General Assembly of North Carolina, including §115-166 and the amendments to §115-176, §115-117 and §115-178.

unable to discern any evidence of "good faith" in the provisions of Chapter 70 and several of the other legislative acts enacted at the 1956 Extra Session. The pattern is plain—the Legislature has adopted procedures to defeat the Brown decision. In doing so it is safe to say that Chapter 70 is invalid on its face.

#### [No Automatic Admission]

Nothing herein contained should be construed as automatically granting to plaintiffs the right to enter schools of their choice. The words of District Judge Bryan in the Arlington school case, quoted in the affirmance of his action by the Circuit Court of Appeals, are indeed appropriate. A local school board may as in years prior to the Brown decision, pass upon individual applications for school changes and, so long as discrimination solely by reason of race does not appear, there is no inherent right of any child to attend any particular school in which children of another race are in attendance. But as long as the school boards maintain an announced policy refusing to consider the applications separately and take no steps towards removing the requirement of segregation in the schools which the Supreme Court has held violative of the constitutional rights, there appears to be nothing any court may do other than to enjoin the violation of constitutional rights in the operation of schools by the authorities and, in the event of continued violation, proceed by way of contempt.

#### THE NECESSITY OF A THREE-JUDGE COURT.

Little need be said as to the necessity of a three-judge court as provided by 28 U.S.C. § 2281. Despite the inclination of a District Judge to certify the need for same in matters of a sensitive nature such as these school segregation cases, it is clear that, under the pleadings in these cases, it would be improper to convene same. Plaintiffs do not seek an injunction against the enforcement of any state law. They merely request an injunction directed to defendants of any policy, practice, custom and usage of segregating students in the public schools. In *Bush v. Orleans Parish School Board*, 138 F.Supp. 336, a three-judge court held that no serious constitutional question, not theretofore decided by the Supreme Court of the United States, was presented. The complaint in

Bush alleged that the Negro children had been denied admission to schools attended by white children, making reference to Louisiana Acts 555 and 556. The three-judge court was then dissolved and District Judge Wright, sitting as a single-judge court, proceeded to ascertain plaintiff's rights on an application for temporary injunction. The District Judge concluded that Louisiana Act 556 of 1954, an administrative remedy, was a part of a legislative plan for maintaining segregation in public schools and was, therefore, invalid on its face. With equal force the same principle is applicable in these cases now before the Court.

The history of the statute, 28 U.S.C. § 2281, reveals that only in cases involving the granting of an interlocutory injunction was a three-judge court required prior to 1948. During the latter year Congress added the proviso that a three-judge court is required where there is sought an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of the statute under attack.

The defenses raised on the motions to dismiss under the provisions of Chapter 70 are invoked for the purpose of defeating the jurisdiction of the Court. Similar defenses could be adopted in any routine case and, if a three-judge court be required, the District Judges would generally

be sitting on a three-judge court. Such a practice would defeat the purpose of a three-judge court which has been designed for a specific class of cases, sharply defined, and which should not be lightly extended. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386; *Phillips v. United States*, 312 U.S. 246; *Smith v. Wilson*, 273 U.S. 388.

There is abundant authority to support the view that only a single-judge court is required to determine these motions to dismiss. To convene a three-judge court would be a futile act as it would be necessary to forthwith dissolve the same. The mere fact that the issues involve the delicate question of racial problems affords no reason for ordering a three-judge court. *Bush v. Orleans Parish School Board*, *supra*; *Davis v. County School Board of Prince Edward County*, 142 F.Supp. 616; *Kelley v. Board of Education*, 139 F.Supp. 578.

Order accordingly.

#### ORDER

For reasons stated in a memorandum this day filed, it is

ORDERED that the original and supplemental motions to dismiss as filed by the respective defendants herein be, and the same are, hereby DENIED.

To which action of the Court, the defendants except.

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## EDUCATION

### Public Schools—Virginia

**The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE et al. v. Doris Marie ALLEN et al.**

**COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, Virginia, et al. v. Clarissa S. THOMPSON et al.**

United States Court of Appeals, Fourth Circuit, December 31, 1956, Nos. 7303 and 7310.

**SUMMARY:** Class actions brought by Negroes in federal district court in Charlottesville and Arlington County, Virginia, had resulted, in each case, in the issuance of an injunction to restrain school authorities from denying admission of Negroes to public schools on grounds of race or color. *Allen v. School Board of Charlottesville*, 1 Race Rel. L. Rep. 886 (W. D. Va. 1956); *Thompson v. County School Board of Arlington County*, 144 F.Supp. 239, 1 Race Rel. L. Rep. 890 (E. D. Va. 1956). On appeal by the school authorities to the Court of Appeals for the Fourth Circuit it was urged that the suits were suits against the state and, for that reason, should have been dismissed. It was also urged that the Negro plaintiffs had not exhausted their administrative remedies and that the injunctive orders were in abuse of the discretion of the courts. The Court of Appeals affirmed both cases, holding

that suits against state officials attempting to apply unconstitutional measures cannot be considered to be suits against the state under the Eleventh Amendment; that administrative remedies need not be exhausted where it is apparent that their pursuit would be futile; and that the injunctive orders, which ordered immediate integration in one case and granted a delay of approximately six months in the other case, were reasonable.

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

PARKER, Chief Judge.

These are appeals in actions instituted in behalf of Negro school children to enjoin school boards and division superintendents of schools from enforcing racial segregation. One action relates to the schools of the city of Charlottesville, Virginia, and the other to the schools of the county of Arlington in that state. Injunctions were granted in both cases and the school authorities have appealed, raising practically the same questions. The questions presented by the appeals are: (1) whether the actions should have been dismissed as suits against the state (2) whether plaintiffs have failed to exhaust administrative remedies, and (3) whether there was abuse of discretion in entering the injunctive orders.

[*Charlottesville Case*]

With respect to the Charlottesville case, it appeared on a hearing duly held that request had been made to the school authorities to take action toward abolishing the requirement of segregation in the schools and that no action had been taken. The district judge in his opinion, after reciting the pertinent evidence, summarized his conclusions as follows:

"The prayer of the complaint is in substance that the defendants be enjoined from continuing to maintain segregated schools. The defendants have refused to agree to abandon the practice of segregation and have made it plain they intend, if possible, to continue it. Under this state of facts the plaintiffs are undoubtedly entitled to maintain this action and to have the relief prayed for.

"It only remains to be determined as to the time when an injunction restraining defendants from maintaining segregated schools shall become effective. The original decision of the Supreme Court was over two years ago. Its supplementary opinion directing that a prompt and reasonable start

be made toward desegregation was handed down 14 months ago. Defendants admit that they have taken no steps toward compliance with the ruling of the Supreme Court. They have not requested that the effective date of any action taken by this court be deferred to some future time or some future school year. They have not asked for any extension of time within which to embark on a program of desegregation. On the contrary the defense has been one of seeking to avoid any integration of the schools in either the near or distant future. They have given no evidence of any willingness to comply with the ruling of the Supreme Court at any time. In view of all these circumstances it is not seen where any good can be accomplished by deferring the effective date of the Court's decree beyond the beginning of the school session opening this autumn. Even though the time be limited it is not impossible that, at the school session opening in September of this year, a reasonable start be made toward complying with the decision of the Supreme Court."

[*Decree*]

The order, which by its terms was to become effective at the commencement of the school term beginning in September 1956, and which retained jurisdiction of the cause for such future action as might be necessary, restrained and enjoined the defendants:

"From any and all action that regulates or affects, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants."

[*Arlington Case*]

The Arlington case was heard upon the pleadings and upon documentary evidence submitted

to the court on a motion to dismiss. The judge found from the documentary evidence and from the statements of counsel in open court that there was no genuine issue as to any material fact in the case and that "on the admissions of record and the uncontrovertible allegations of the complaint, summary judgment should be granted the plaintiffs." With respect to exhaustion of administrative remedies he made the following finding:

"(d) That, as appeared from the said documentary evidence, the plaintiffs before instituting this suit had exhausted all administrative remedies then and now available to them, including the administrative steps set forth in section 26-57, Code of Virginia 1950, in that, they have since July 28, 1955, in effect maintained a continuing request upon the defendants, the County School Board and the division superintendent of schools, for admission of Negro children to the public schools of Arlington county on a non-racial basis, and said request has been denied, or no action taken thereon, the equivalent of a denial thereof."

#### [Decree]

The decree, which was made effective with respect to elementary schools at the beginning of the second semester of the 1956-57 session and with respect to high schools at the commencement of the 1957-58 session, restrained and enjoined the defendants "from refusing on account of race or color to admit to, or enroll or educate in, any school under their operation, control, direction, or supervision any child otherwise qualified for admission to, and enrollment and education in, such school."

The foregoing general language of the decree was limited by paragraph 4 thereof, which made clear that the court was not attempting to direct how the school board should handle the problem of assigning pupils but was merely forbidding unconstitutional discrimination on the ground of race or color. That paragraph is as follows:

"4. The foregoing injunction shall not be construed as nullifying any state or local rules, now in force or hereafter promulgated, for the assignment of children to classes, courses of study, or schools, so long as such rules or assignments are not based upon race or color; nor, in the event of a complaint hereafter made by a child as to

any such rule or assignment, shall said injunction be construed as relieving such child of the duty of first fully pursuing any administrative remedy now or hereafter provided by the defendants or by the Commonwealth of Virginia for the hearing and decision of such complaint, before applying to this court for a decision on whether any such rule or assignment violates said injunction."

In his memorandum filed at the time of the entry of the decree, the Judge said:

"It must be remembered that the decisions of the Supreme Court of the United States in *Brown v. Board of Education*, 1954 and 1955, 347 U.S. 483 and 349 U.S. 294, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

#### [Decrees Reasonable]

We see nothing in these decrees of which the defendants can complain. The decrees do not attempt to direct the school officials as to how they shall perform their duties or exercise the discretion vested in them by law, but simply forbid them to discriminate against the plaintiffs, or other Negro children similarly situated, on the ground of race or color, in violation of their rights under the Constitution of the United States as declared by the Supreme Court.

A suit for such relief is not a suit against a state within the meaning of the 11th amendment to the Constitution but is a suit for the protection of individual rights under the Constitution by enjoining state officers and agencies from taking action beyond the scope of their legal powers.

**[Difference Noted]**

The difference between using the injunctive power of the court to direct the exercise of discretion by a state officer and using it to enjoin the violation by him of constitutional rights under the authority of his office was pointed out nearly a half a century ago in *Ex Parte Young* 209 U.S. 123, 159-160, where the court said:

"It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the state of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional.

"If the act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

See also *Lane v. Watts* 234 U.S. 525, 540; *Philadelphia Co. v. Stimson* 223 U.S. 605; *Colorado v. Toll* 268 U.S. 228, 230; *Ferris v. Wilbur* 27 F.2d 262; *Appalachian Electric Power Co. v. Smith* 4 Cir. 67 F.2d 451, 454.

It is argued that the doctrine thus laid down must be confined to individuals and may not be

applied to corporate agencies of the state such as school boards. We see no ground for such a distinction. If high officials of the state and of the Federal Government (see *Philadelphia Co. v. Stimson, supra*) may be restrained and enjoined from unconstitutional action, we see no reason why a school board should be exempt from such suit merely because it has been given corporate powers. A state can act only through agents; and whether the agent be an individual officer or a corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action.

While no such question was raised in the cases heard by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 and 349 U.S. 294, the question was inherent in the record in those cases; and it is not reasonable to suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment to the Constitution.

There is nothing to the contrary in the decision of this court in *O'Neill v. Early* 4 Cir. 208 F.2d 286, which was a suit against a state agency to establish a liability payable out of public funds controlled by the agency in its supervision of the state's educational system. We quoted from the decision of the Supreme Court, speaking through Mr. Justice Reed in *Great Northern Life Ins. Co. v. Read* 322 U.S. 47: "Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution." This is, of course, a very different thing from enjoining a state officer or state agency from taking action violative of the Constitution.

**[Exhaustion of Administrative Remedies]**

We think that the court was clearly right with respect to exhaustion of administrative remedies. The pupil placement law recently enacted by the General Assembly had not become effective and, in so far as section 22-27 of the Code of Virginia is concerned, that only provided for petition to a school board by joint action of five heads of families who felt themselves aggrieved by action of the board. If it could be held applicable to the plaintiffs here, its provisions were

satisfied by the applications made to the boards without result in both cases here before us by counsel acting in behalf of plaintiffs. Defendants argue, in this connection, that plaintiffs have not shown themselves entitled to injunctive relief because they have not individually applied for admission to any particular school and been denied admission. The answer is that in view of the announced policy of the respective school boards any such application to a school other than a segregated school maintained for colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief. Reliance is placed upon our decision in *Carson v. Warlick* 4 Cir. \_\_\_\_ F.2d \_\_\_\_\_. In that case, however, an adequate administrative remedy had been prescribed by statute, the plaintiffs there had failed to pursue the remedy as outlined in the decision of the Supreme Court of the state and there was nothing upon which a court could say that if they had followed such remedy their rights under the Constitution would have been denied them.

[*Decrees Valid*]

There is no basis for the contention that either of the judges below abused his direction in granting the injunction. It had been two years since the first decision of the Supreme Court in *Brown v. Board of Education* and, despite repeated demands upon them, the Boards of Education had taken no steps towards removing the requirement of segregation in the schools which the Supreme Court had held violative of the constitutional rights of the plaintiffs.

This was not "deliberate speed" in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of the injunction to dispel the misapprehension of the school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court.

Very much in point is the decision of the Court of Appeals of the Fifth circuit in *Jackson v. Rawdon* 5 Cir. 235 F.2d 93, cert. den.

\_\_\_\_ U.S. \_\_\_\_ which reversed the action of a district judge in refusing an injunction in a somewhat similar case.

Speaking for the court in that case, Chief Judge Joseph C. Hutcheson said:

"We think it clear that, upon the plainest principles governing cases of this kind, the decision appealed from was wrong in refusing to declare the constitutional rights of plaintiffs to have the School Board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration to abolish segregation in Mansfield's only high school and to put into effect desegregation there.

"Had the court made such a declaration and retained the cause for further orders necessary to implement it, deferment to a later time of action on the prayer for injunctive relief, if necessary, may well have been within his discretion. The issuance of such a declaration of rights with retention of the case would have given the court the means of effectually dispelling the misapprehension of the school authorities as to the nature of their new and profound obligations and compelling their prompt performance of them."

The decrees here are not harsh or unreasonable but merely require that the law be observed and discrimination on the ground of race be eliminated. The Arlington decree expressly states that local rules as to assignment to classes, so long as such rules are not based on race or color, are to be observed, and that administrative remedies for admission to schools must be exhausted before application is made to the court for relief on the ground that its injunction is being violated. While the Charlottesville decree does not contain this express provision, the provision is so eminently reasonable that we may safely assume that enforcement of that decree will not proceed upon different principles. As much was indicated by the judge in his remarks denying the motion to dismiss.

AFFIRMED.

## EDUCATION

### Colleges and Universities—Tennessee

**Ruth BOOKER, an Infant, by Dovie Booker, her mother and next friend, et al. v. State of TENNESSEE BOARD OF EDUCATION et al.**

United States Court of Appeals, Sixth Circuit, January 14, 1957, No. 12775.

**SUMMARY:** Negro applicants for admission to Memphis State College, Tennessee, brought an action in federal district court to enjoin the Tennessee Board of Education and other college officials from denying them admission on the basis of race or color. The board had adopted a plan calling for admission to state supported colleges and universities on a racially non-discriminatory basis over a five year period, beginning with graduate schools and opening the next lower grade each year (1 Race Rel. L. Rep. 262). The district court refused to convene a three-judge court and in the trial on the merits accepted the plan as good faith compliance with the decisions of the United States Supreme Court. 1 Race Rel. L. Rep. 118 (W. D. Tenn. 1955). The Supreme Court of the United States denied the applicants leave to file a petition for mandamus to compel the convening of a three-judge court. 351 U. S. 948, 1 Race Rel. L. Rep. 643 (1956). On the appeal of the decision on the merits to the Court of Appeals for the Sixth Circuit the court reversed and remanded, one judge dissenting. The Court of Appeals held that, when equally pertinent to the limitation of white applicants, the reasons given for delay of admission to Negroes were racially discriminatory and not sufficient to justify a delay of up to five years in light of the Supreme Court's requirement of "all deliberate speed."

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

ALLEN, Circuit Judge.

This case arises upon complaint of five plaintiffs, members of the colored race, praying for a permanent injunction to restrain the Board of Education of the State of Tennessee, officials of such Board, and the president and registrar of Memphis State College, from refusing to admit plaintiffs to Memphis State College solely because of their race.<sup>1</sup> The facts are not in controversy. The findings of fact entered by the District Court are given in the margin.<sup>2</sup>

<sup>1</sup> The parties will be denominated as in the court below.

- 1. That the Tennessee State Board of Education intends promptly to comply with the decision and opinion of the Supreme Court of the United States in the segregation cases and, pursuant to such intention, and in good faith, has devised the plan hereinafter referred to, after consultation with advisory groups representing various segments of affected interests.
2. There was no intention or effort upon the part of the said Board to evade or circumvent the decision of the Supreme Court, but, after full discussion, the Board concluded the plan proposed was the most feasible in view of the physical capacities and financial situation of the various schools under its jurisdiction.
3. Memphis State College at present has the largest enrollment in its history and its physical facilities would be inadequate, should unrestricted admission be decreed.
4. At present, this institution has not been allocated enough funds from the State upon which its existence depends and which constitutes the major

All plaintiffs are residents of the City of Memphis, in the Western Division of the State of Tennessee, and also in the district served by Memphis State College, a public educational institution of the State of Tennessee. As to educational requirements it is conceded that plaintiffs are fully qualified for admission to the college and that they have been denied admis-

portion of its financial support, to authorize unrestricted integration and to allow it to operate should such be done.

5. Memphis State College is located in the portion of the State in which the colored race maintains its highest density of population and is therefore subjected to the potential of a heavy enrollment from members of the colored race.
6. Memphis State College is a member of the State Association of Colleges whose rules require certain standards by all its members. The loss of membership in this association will result in students who take courses at Memphis State College being deprived of credit for work done in such college should they desire to transfer to another member of the association or other similar associations. Virtually all institutions of collegiate standing in the United States are members of this or similar associations. Memphis State College does not now and will not prior to July 1, 1957, have adequate finances to enable it to maintain its membership in this association should there be the increase in applications for instruction therein which very reasonably may flow from unrestricted admission. Due to its location and the high percentage of eligible colored students, a considerable increase in applications to it from qualified students of this race may be expected.

sion solely because of their color. It is the policy of the State of Tennessee to maintain Memphis State College for the education, exclusively, of white persons. This policy is required under Article 11, Section 12, of the Tennessee Constitution of 1870, the pertinent part of which reads as follows:

"... No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school."

[*Required by Code*]

It also is required under Sections 11395 and 11396 of the Code of Tennessee which read as follows:

"Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning.

"Unlawful for teacher to allow such mixed attendance or to teach them in same class.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement."

The complaint prayed that the District Court convene a three-judge district court under Title 28, U. S. C., Sections 2281 and 2284, to hear the case, but this application was refused. Plaintiffs contend that under the Federal Constitution,

7. The Court further finds that since 1870 the State of Tennessee has pursued a course of segregated schools between the two races and that during this interval customs have arisen between the two races, which might be disturbed seriously by an abrupt abrogation thereof. The Court finds that a gradual plan of desegregation in its opinion offers greater possibility of eventual complete acceptance of the situation by members of both races than would an abrupt transition at present.
8. The Court also finds that the respondent members of the Board are proceeding with all deliberate speed in order to complete orderly and peaceful integration. The Court also finds that time is absolutely necessary to carry out in an effective manner the ruling of the Supreme Court.

particularly the Fourteenth Amendment, the validity of the Tennessee segregation statutes and state constitution was directly involved and a three-judge court was therefore required. However, the gist of the controversy was the question of alleged discrimination under the Fourteenth Amendment. Moreover, the constitutional contention no longer presents a question of substance. It is essential to the jurisdiction of the federal court in three-judge cases that a substantial federal question be presented. *Ex parte Poresky*, 290 U.S. 30. The Supreme Court there pointed out that a federal question may be un-substantial "because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject. . . .'" This is the precise situation here presented. The previous decisions of the Supreme Court, *Brown v. Board of Education*, 347 U.S. 483, and *Brown v. Board of Education*, 349 U.S. 294, have foreclosed the subject. As declared in the latter decision, all provisions of federal, state, or local law requiring or permitting discrimination on the ground of race or color in public educational institutions must yield to the principle that racial discrimination in public education is unconstitutional. The District Court correctly held that the invalidity of the Tennessee constitutional provisions and statutes providing for segregation is "patent" and that a three-judge court was not required. In accord with this conclusion are *Wichita Falls Junior College District v. Battle*, 204 F.2d 632 (C. A. 5), certiorari denied 347 U.S. 974, and the final decision in *Board of Supervisors, etc. v. Tureaud*, 228 F.2d 895 (C. A. 5). This case was heard en banc and six judges concurred in the conclusion that a hearing by a three-judge court was not required to decide a factual question of discrimination.

[*Proceeded With Trial*]

As the District Court had jurisdiction it properly proceeded with the trial. The principal issue was factual, namely, whether continuation of discrimination prohibited by the equal protection clause of the Fourteenth Amendment was contemplated by the proposed plan. The District Court decided that the plan devised by defendants for the integration of the races is in all respects fair and reasonable, and denied the injunction prayed for.

The defense to the action was based upon the

ground that Memphis State College is not physically equipped to handle a freshman class in excess of 1,000 students, that if all persons qualified for such admission are admitted without restriction an overtaxation of the physical facilities now available will result, and that such an overtaxation of facilities will result in the school being deprived of its accredited standing and membership in the Southern Association of Colleges. Defendants also aver that Memphis State College is financed by appropriations made by the General Assembly of the State of Tennessee and has no other source of income except tuitions and other fees. They point out that the General Assembly, for the period of July 1, 1955, until July 1, 1957, has made appropriations which are completely inadequate if all the available students in Shelby County alone undertake to enroll in the college. Citing the decision of the Supreme Court, *Brown v. Board of Education*, 349 U.S. 294, that courts of equity in providing for desegregation in a systematic and effective manner may consider problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, the Board in a formal resolution has adopted the following program of transition to a desegregation basis:

*[Plan of Board]*

"For the scholastic year 1955-56, qualified negro students shall be admitted to do graduate work at Memphis State College, Middle Tennessee State College, East Tennessee State College and Austin Peay State College. During the said scholastic year, qualified white students shall be admitted to graduate classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1956-57, qualified negro students shall be admitted to the graduate classes and senior classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate classes and senior classes of the Tennessee Agricul-

tural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1957-58, qualified negro students shall be admitted to the graduate, senior and junior classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate, senior and junior classes of Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1958-59, qualified negro students shall be admitted to the graduate, senior, junior and sophomore classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, qualified white students shall be admitted to graduate, senior, junior and sophomore classes of the Tennessee Agricultural and Industrial State University for Negroes at Nashville.

"For the scholastic year 1959-60, and thereafter, qualified negro students shall be admitted to the graduate, senior, junior, sophomore and freshmen classes of Memphis State College, Middle Tennessee State College, East Tennessee State College, Austin Peay State College and Tennessee Polytechnic Institute at Cookeville. During the said scholastic year, and thereafter, qualified white students shall be admitted to graduate, senior, junior, sophomore and freshmen classes of Tennessee Agricultural and Industrial State University for Negroes at Nashville."

*[Plan Not Acceptable]*

Conceding that the Board was moved by proper motives in framing the proposed plan, a majority of the court thinks that in two respects the plan does not comply with the requirements of *Brown v. Board of Education*, 349 U.S. 294. Although the record shows that the physical facilities of Memphis State College would be inadequate if the student body in the undergraduate school were radically increased, this circumstance is not a valid defense to the

action filed. The Board is authorized to establish a limit to the number of admissions, but the Board is not authorized to establish limitations based upon race or color. As stated by Chief Justice Hughes in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, the Board is under an obligation to furnish the training "upon the basis of an equality of right." As held in *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631, the state must provide education for plaintiffs under the equal protection clause of the Fourteenth Amendment and must provide it as soon as it does to applicants in any other racial group. The record shows by uncontradicted evidence that 143 nonresidents of Tennessee were enrolled in the Memphis State College for the fall semester of 1955; that 1079 nonresidents of Memphis were currently enrolled in the college. Of the out-of-state students currently enrolled approximately 50 were first-year students and approximately 30 were out-of-state second-year students. Giving full consideration to the fact that the Legislature has not allocated sufficient funds to the college to authorize unrestricted expansion of the student body, and that such unrestricted expansion might threaten the maintenance of accredited collegiate standing, the majority of the court thinks that defendants' adopted plan proposes to set up a system of admission to the college which does not recognize the rights of these plaintiffs. It would be feasible and legitimate for Memphis State College, in order to prevent overcrowding and loss of accreditation, to limit its substantial out-of-state membership, but the plan contemplates no such limitation. It would be legitimate to limit the size of the student body on a basis nondiscriminatory to any group, or race, but the plan adopted postpones these qualified plaintiffs for five years in their admission to the freshman class, and expressly contemplates that white students who have registered later than these plaintiffs shall be admitted earlier. This is a clear discrimination between the races. It is another form of discrimination that plaintiffs may be compelled to seek education elsewhere in order to avoid discrimination and to secure a college education now without being deferred for several years. It is less expensive in time and money for these qualified applicants to attend a college within the district than to be compelled to seek college education elsewhere. An exclusion on account of race and color which forces an applicant to attend a distant school at greater

expense is discriminatory, *Wichita Falls Junior College District v. Battle*, *supra*.

#### [Other Cases]

We are aware of the declarations of the Supreme Court that physical conditions of plant and transportation may be considered in working out an orderly transition from a system of segregation to a system of desegregation. But the court also declared that this should be done with all deliberate speed. To deny entrance to these plaintiffs for five years, to place them at the bottom of the list without regard to the time of their application for entrance, seems to a majority court a noncompliance with the declaration of the Supreme Court. *Brown v. Board of Education*, *supra*. We think our conclusion is supported in principle by and accords with the late decisions. *Gray v. University of Tennessee*, 97 F.Supp. 463. In this case the university decided to admit the appellants as requested, after the District Court had held that the appellants were entitled to relief, and thereupon the case was dismissed as moot by the Supreme Court. *Gray v. Board of Trustees of the University of Tennessee*, 342 U.S. 517; *Bolling v. Sharpe*, 347 U.S. 497; *Lucy v. Adams*, Dean of Admissions, University of Alabama, 350 U.S. 1; *Willis v. Walker*, 136 F.Supp. 177. Cf. *Sipuel v. Board of Regents of The University of Oklahoma*, *supra*; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637; *McKissick v. Carmichael*, 187 F.2d 949 (C.A. 4), certiorari denied 341 U.S. 951.

The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with the majority opinion.

#### [Dissent]

**MILLER**, Circuit Judge, dissenting.

The majority opinion suggests different ways in which the physical and financial difficulties involved in immediate integration might be overcome at Memphis State College, and accordingly rejects the plan which does not accomplish that result. That, to me, is not the issue in the case. Admittedly, there may be different solutions to the problem. But if the plan proposed by the school authorities, which provides for partial elimination of segregation at the present time, and additional elimination in each succeeding

year, and complete elimination over a period of five years, is a good-faith solution, even though requiring time, it is not to be rejected by the courts. The Supreme Court, in *Brown v. Board of Education*, 349 U.S. 294, stated the issue in pointing out that the school authorities "have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles" (Page 299). The opinion further stated that the District Court can best perform this judicial appraisal.

The District Judge in exercising the judicial appraisal so delegated to him by the Supreme Court found as facts that there was no effort or intention on the part of the State Board of education to evade or circumvent the decision of the Supreme Court, that it had devised the proposed plan in *good faith* after consultation with advisory groups representing various segments of affected interests, that on account of the physical, financial and practical problems involved, which are given in detail in its findings, a gradual plan of desegregation offers greater possibility of eventual complete acceptance of the situation by members of both races than would an abrupt transition at present, and that time is absolutely necessary to carry out in

an effective manner the ruling of the Supreme Court.

[*No Abuse of Discretion*]

The majority opinion concedes that the facts are not in controversy. Unless the District Judge abused his discretion in approving the plan proposed to meet the problems presented by such a factual background, we are not authorized to reject the plan in order to substitute a different plan of our own. That there are problems, practical as well as physical and financial, can hardly be denied. The District Judge, a long-time resident of Memphis, Tenn., and closely in touch with the local situation, is much better situated to understand, analyze and evaluate the problems than are we. As stated in *Brown v. Board of Education*, *supra*, at page 300, that while there is a duty upon the school authorities to make a prompt and reasonable start toward full compliance with its ruling, "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." The District Judge expressly found that time was absolutely necessary to carry out the ruling in an effective manner. I am of the opinion that there was no abuse of discretion on the part of the District Judge and that the judgment should be affirmed.

## EDUCATION Private Schools—Pennsylvania

**In Re: ESTATE OF STEPHEN GIRARD [Appeal of William Ashe Fouse (No. 167), etc.]**

Supreme Court of Pennsylvania, Eastern District, November 12, 1956, 127 A.2d 287.

**SUMMARY:** The will of Stephen Girard, who died in 1831, established a trust for the education of "poor white male orphans." The trust, under the terms of the will, is administered by a board consisting in part of elected officials of the City of Philadelphia and members appointed by the judges of courts of common pleas of the county. An eight-year-old Negro boy applied for admission to Girard College. His application was refused because he did not meet the trust criterion of "white." Together with other rejected Negro applicants, he filed a petition in the Orphan's Court of Philadelphia County, claiming the limitation to "white" persons was invalid and seeking a review of the denial of his admission. That court denied the application, holding that the operation of Girard College is not "state action" under the Fourteenth Amendment to the United States Constitution (see 1 Race Rel. L. Rep. 613) and that the College is not a public institution, so that the decision in the *School Segregation Cases* is not applicable. 1 Race Rel. L. Rep. 325 (1955). That decision was affirmed by the full bench of the Orphan's Court of Philadelphia County. 1 Race Rel. L. Rep. 340 (1956). The applicant appealed to the Pennsylvania Supreme Court. That court, one justice dissenting,

upheld the decision of the Orphan's Court denying the petition for admission, stating that the activity of public officials in administering the trust is not to be construed as "state action." [Marginal references throughout the opinions have been numbered by the editors.]

#### STERN, C. J.

While it may seem unfortunate that the court is obliged to sanction the exclusion of any child from even a *private* school or orphanage because of race, creed or color if otherwise entitled to admission, the Court is clearly of opinion that the unanimous decision of the Orphans' Court, supported by the learned and comprehensive opinions of Judge Bolger and Judge Lefever, must be affirmed, it being clearly understood at the outset that the beneficiaries of the charity of Stephen Girard are not being determined by the State of Pennsylvania, nor by the City of Philadelphia, nor by this Court, but solely by Girard himself in the exercise of his undoubted right to dispose of his property by will, and, in so doing, to say, within the bounds of the law, who shall enjoy its benefits.

#### [*Girard Will*]

Stephen Girard,—merchant, mariner, banker, and philanthropist,—died on December 26, 1831; his will, dated February 16, 1830, and two codicils thereto, were probated at Philadelphia five days later. The will is, in many respects, a remarkable document; it was prepared with the aid of William J. Duane, distinguished leader of the bar in his day, and was the product of protracted consultations between them which extended over the course of some five or six weeks. Briefly summarized, it provided, after making a number of specific gifts to various institutions and individuals, for a devise and bequest of his entire residuary estate to "The Mayor, Aldermen and Citizens of Philadelphia"<sup>1</sup> their successors and assigns, in trust to erect a "college" on a square of ground between High and Chestnut Streets and 11th and 12th Streets, in the City of Philadelphia; (by a codicil he changed this location to an estate he had purchased on "the Ridge Road in Penn Township.") He stated that "I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more

comfortable maintenance than they usually receive from the application of the public funds." He provided for the selection of a competent number of instructors, teachers, assistants and other necessary agents, and that as many poor white male orphans, between the ages of six and ten years as the income should be adequate to maintain, should be admitted into the college, preference being given first to orphans born in the City of Philadelphia, secondly, to those born in any other part of Pennsylvania, thirdly, to those born in the City of New York, and lastly, to those born in the City of New Orleans. He provided that the orphans admitted into the college should be "there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner"; due regard was to be paid to their health, and to that end they were to have suitable exercise and recreation, and he prescribed in detail the branches of education in which they should be instructed. He declared that "together with the object just adverted to, [that is, the provision for the poor male white orphans] I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the River Delaware . . . , and accordingly, he bequeathed out of the residue the sum of \$500,000 in trust to pave Delaware Avenue and Water Street and to make certain other improvements in that part of the city. After a bequest to the Commonwealth of Pennsylvania of \$300,000 he left the remainder of his residuary estate in trust to apply the income to the further improvement and maintenance of the college, to enable the city to provide for a competent police force, and to improve the property and general appearance of the city. He stated that "To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—after providing for the College as hereinbefore directed, as my primary object." If the city should knowingly and wilfully violate any of the conditions in the will, the said remainder of the residue was given to the Commonwealth of Pennsylvania for the purposes of internal

1. This was the corporate name of the city under the Act of March 11, 1789, 2 Sm. L. 462. The title was changed by the Consolidation Act of February 2, 1854, P.L. 21, to "The City of Philadelphia."

navigation, except that the income from his real estate in Philadelphia was to be forever applied to the maintenance of the college; if the Commonwealth failed to apply the bequest to the purposes mentioned, the said remainder was given to the United States of America for the purposes of internal navigation. There was a provision in the will that the city should keep separate accounts of the trust funds, which were not to be used for any but the prescribed purposes, and should furnish an annual account thereof to the legislature.

[*Testing of Will*]

Because of the financial panic of 1837 and the consequent shrinkage of the assets of the estate there was some delay in the construction of the buildings and the college was not opened until January 1, 1848. Since that time, a period now of over a hundred years, it has been conducted in conformity with the purposes expressed in Girard's will. As is not altogether unusual in such cases, some of his heirs were disappointed at the disposition he made of his wealth, and accordingly they indulged in a number of attacks upon the validity of the will, the first of which resulted in the famous argument in the Supreme Court of the United States in 1844 between Daniel Webster on the one side and Horace Binney on the other. Two main questions were there involved, one, whether the city had the legal power to accept the trust confided to it, and the other, whether the trust in regard to the college was rendered invalid by a provision in the will that no ecclesiastic, missionary or minister of any sect whatsoever, should ever hold or exercise any station or duty whatever in the college, nor be admitted there for any purpose. (Girard carefully explained in his will that he made this provision because, there being a multitude of sects, he did not wish to expose the orphan children to any doctrinal or sectarian controversies.) The legislature, by Acts of March 24, 1832, P.L. 176, and April 4, 1832, P.L. 275, had provided the necessary legislation for the improvement by the city of Delaware Avenue and Water Street, and had provided further that it should be lawful for the city to enact all such ordinances and do all such acts as might be necessary and convenient for the full and entire acceptance and execution of all the bequests, trusts and provisions in Girard's will, and for the appointment of such

agents as might be deemed essential to the execution of the trusts.<sup>2</sup> The Supreme Court held in *Vidal et al v. Stephen Girard's Executors*, 43 U.S. (2 Howard) 127, in an elaborate opinion by Mr. Justice Story, that the city was legally capable of taking the bequest of the estate for the erection and support of the college upon the trusts designated in the will, and that these were valid charitable trusts and capable of being carried into legal effect.

[*City as Trustee*]

In *Girard v. Philadelphia*, 74 U.S. (7 Wallace) 1, the decision in the Vidal case was affirmed, and it was held that the Consolidation Act had not changed the identity of the city so as to affect in any way its administration of the trust. The Court stated (as will be referred to again hereafter): "Now, if this were true, [that the city had become unable to administer the trust] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee." In *The City of Philadelphia v. The Heirs of Stephen Girard*, 45 Pa. 9, our own Court likewise held that the trusts created in the will were valid, and pointed out that the distinction must carefully be observed between the purposes and provisions of the trust itself and any problems or difficulties arising from the mode of its administration, the former not being affected by the latter; attention was called to the important fact that Girard stated that it was his "primary object" to construct and maintain the college. In *Philadelphia v. Fox*, 64 Pa. 169, it was once again held that Philadelphia could act as a trustee to carry out the trusts under Girard's will, and that the Act of June 30, 1869, P.L. 1276, providing for the administration by a Board of Directors of City Trusts of the trusts confided to the city, the Board being "dissociated from the general government of the city," was a valid enactment. And finally, in *Girard's Appeal*, 4 Pennypacker 347, dealing with another attack on the will by Girard's heirs, it was held that they were concluded by the decree of the United States Supreme Court in the Vidal case, and that the establishment of the Board of Directors of City Trusts was legal and proper. All these onslaughts in both the Courts of Pennsylvania and of the United States left the

2. Similar legislation, in aid of certain provisions of the will, were enacted by the Acts of February 27, 1847, P.L. 178, and April 20, 1853, P.L. 623.

Girard charity, as was said by the Court in Benjamin Franklin's Administratrix v. The City of Philadelphia, 2 Dist. Rep. 435, 437, as "fixed, firm, and immovable as a rock."

#### [Admission Requirements]

Coming now to the particular issue involved in the present case, it arises from the provision in the will which limits the admission into the institution to applicants possessing five qualifications:-they must be poor, they must be white, they must be male, they must be orphans, (which has been construed to mean *fatherless* children), and their ages must be between six and ten; there are also preferences prescribed in regard to the birthplaces of the applicants. It is contended that the Fourteenth Amendment has made the restriction to white children unconstitutional. The city, the Commonwealth, and two negro applicants for admission to the institution, have filed petitions for a citation on the Board of Directors of City Trusts to show cause why these applicants should not be admitted. The court affirmed the Board's refusal of the applications for admission and dismissed the petitions for a citation.

#### [Testamentary Right]

Subject, of course, to compliance with all applicable laws, it is one of our most fundamental legal principles that an individual has the right to dispose of his own property by gift or will as he sees fit; indeed this right is so much protected that a testator's directions will be enforced even though contrary to the general views of society, (see, for example, Higbee Will, 365 Pa. 381, 75 A.2d 599) and however arbitrary, unwise, intolerant, discriminatory, or ignoble his exercise of that right may be. He is entitled to his idiosyncrasies and even to his prejudices. It was said in Brown v. Hummel, 6 Pa. 86, 94, 95: "It is the principle and not the individual instance that is to be considered. What private charity will next be disturbed and invaded? The will of Stephen Girard offers a conspicuous mark. . . . The most solemn act of a man's life, which is consummated by his death, is his last will and testament. By that act he makes a law for the disposition of his own property, acquired by his own industry, which, if it does not contradict the law of the country, has hitherto been considered inviolate. Shall it be so considered no longer in Pennsylvania?" Equally

cogent language is to be found in many other cases in this Court, for example, in Ervine's Appeal, 16 Pa. 256, 265, and again in Cauffman v. Long, 82 Pa. 72, 77, 78, where it is said: "No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. . . . In many instances testamentary dispositions of property seem harsh, if not unjust, . . . It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human nature. It must be remembered that in this country a man's prejudices are a part of his liberty. . . . he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law." In Dulles's Estate, 218 Pa. 162, 163, 67 A. 49, it was said: "The fundamental law of Pennsylvania in regard to property, which ought not to require restatement as often as it does, is that the owner may do as he pleases with it provided the disposition be not to unlawful purposes, and what he may do himself he may do by agent while living, or by executor after death." In McCown v. Fraser, 327 Pa. 561, 564, 192 A. 674, 676, it was said: "The right to dispose of property is an incident of ownership, and a gift is none the less valid because it is undeserved or improvident." In Wetzel v. Edwards, 340 Pa. 121, 128, 16 A.2d 441, 444, it was said: "No right of a citizen is more valued than the power to dispose of his property by will." In Johnson Will, 370 Pa. 125, 127, 128, 87 A.2d 188, 190, it was said: "But it is and always has been the law of Pennsylvania that every individual may leave his property by will to any person, or to any charity, or for any lawful purpose he desires, . . . While it is difficult for many people to understand how or why a man is prompted to make a strange or unusual or an eccentric bequest, . . . we must remember that under the law of Pennsylvania 'a man's prejudices are a part of his liberty. He has a right to the control of his property while living and may bestow it as he sees fit' at his death."

#### [Method of Selection]

Stephen Girard naturally must have realized that he could not create an institution large enough to furnish both sustenance and educa-

tion to any and all the children of Philadelphia, Pennsylvania, New York and New Orleans who might desire to be admitted; he could provide for only a small minority of such children and accordingly he prescribed a method of selection as he had both a legal and moral right to do unless there were involved a violation of some affirmative provision of law. Admittedly there are provisions in the will which represent Girard's individual views regarding the education and rearing of the children the wisdom of which might be subject to differences of opinion, but, even if those provisions be considered peculiar, Girard was entitled to prescribe them for the operation of the institution which he was founding.

[*State Action*]

The question then, is whether the limitation in Girard's will to white children as the beneficiaries of his college or orphanage, although undoubtedly lawful at the time of the execution of his will and of his death, has become invalid as a result of the adoption of the Fourteenth Amendment which prohibited any State from denying to any person within its jurisdiction the equal protection of the laws. No such question could possibly arise in the case of a private charitable trust for the Fourteenth Amendment applies only to agencies of the State or of a municipality within the State; it is directed solely against State, not individual, action. It was said in the Civil Rights Cases, 109 U.S. 3, 17: "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." In Corrigan v. Buckley, 271 U.S. 323, 330, it was said: "And the prohibitions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals. . . . It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. . . . It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property. . . ." In Shelley v. Kraemer, 334 U.S. 1, 13, it was said: "Since the decision of this Court in the Civil Rights Cases,

109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." And in Rice v. Sioux City Cemetery, 349 U.S. 70, 72, it was said: "The basis for petitioner's resort to this Court was primarily the Fourteenth Amendment, through the Due Process and Equal Protection Clauses. Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked." And while it would no doubt constitute "State action" for a court to enforce a restriction or discrimination invalid under the Fourteenth Amendment, the restrictive provisions themselves, as was said in *Shelley v. Kraemer*, *supra* (p. 13), "cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those [provisions] are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." It is perfectly clear, therefore, that private trusts for charitable purposes, not being subject to or controlled by "State action," are wholly beyond the orbit of the Fourteenth Amendment. Such trusts abound in overwhelming numbers and there can be no question as to their legality however limited be the class of their beneficiaries or whatever be the nature or basis of their restrictions; charitable trusts for limited groups, whether racial or religious, are as valid as if for all the people of the world. We have charitable trusts for ministers of various church denominations, for foreign missions, for churches, priests, Catholics, Protestants, Jews, whites, negroes, for relief of the Indians, for widows or orphan children of Masons or other fraternities, for sectarian old folks homes, orphanages, and so on. Certainly no one would contend that a donor or a testator could not establish a charity, the beneficiaries of which were to be those whom he designated,—persons of any prescribed race, creed or color, or however otherwise differentiated. The court is concerned only with the legal right of such selection by a donor or testator and not with

whatever illiberalism he may display in his exercise of the right.<sup>3</sup>

[*Trust Capacity of City*]

The question here involved finally narrows down, then, to the contention of the petitioners that the trust for the orphanage or college created in Girard's will is not a *private* trust, but that it comes under the principle of "State action" within the compass of the Fourteenth Amendment because of the fact that it is the City of Philadelphia which is the trustee appointed by Girard and which has ever since administered the trust. In considering the question thus raised it must be immediately borne in mind that we are not dealing here with a racial discrimination created by a *city ordinance* as in *Buchanan v. Warley*, 245 U.S. 60, or *Harmon v. Tyler*, 273 U.S. 668, or *Richmond v. Deans*, 281 U.S. 704, but by a private individual disposing of his own property. It is true that Girard appointed the City of Philadelphia as the trustee to administer the trust according to the terms of his will, but he certainly did not intend thereby to empower it to conduct such administration in its *public or governmental capacity*, or to bring into play any of its *proprietary* rights since it is merely the title holder of Girard's property and not its beneficial owner. As a *trustee* it was to act and could act only in a *fiduciary* capacity, exercising no State or governmental function or power in the slightest degree, but being limited to the same rights, powers and duties, no more and no less, as those of any private individual or trust company acting as trustee. If it were to be held that the city was acting in a public or governmental capacity instead of merely as a fiduciary, and therefore was engaged in "State action," it could legislate; it could change the plans, structure and terms of the entire will; it could provide for co-education instead of the beneficiaries being limited to males; it could prescribe a different age limit instead of the children being confined to those between six and ten years of age; it could provide that not only orphans but

*all* children could enjoy the benefit of the charity; it could, in short, assume to exercise the same complete, unrestricted control over the college as if it were a *public* institution. In fact the college is solely responsible for its own policies and management. Its employees are not employees of the city but of the trust estate. All provisions of the will show that it was not intended to be a public school; indeed, it is not merely a school at all but what Girard himself called in a codicil to his will, an "Orphan Establishment," a home where the fatherless boys eat, sleep, study and live together, enjoying the testator's bounty which provides for them not only an education but also lodging, board, clothing and all the necessities of life. The situation, therefore, is not to be confused with the so-called de-segregation cases which dealt with public schools where no discrimination in respect to race, creed or color, as the United States Supreme Court has decided, is permissible under the Fourteenth Amendment. Girard College is a comparatively large institution, but no different legal principles apply to it for that reason than to the smallest of private schools. It is erected on land owned by Girard and the buildings were constructed with his own funds (cf. *Reuben Quick Bear v. Leupp*, Commissioner of Indian Affairs, 210 U.S. 50, where the Commissioner was allowed to contract with a sectarian mission for the education of Indian pupils supported by trust funds belonging to their own tribe.) The college has been supported and maintained for now over a century by Girard's estate; not a penny of State or city money has ever gone into it;<sup>4</sup> no taxpayer has ever been called upon to contribute to it; true, it is exempt from local taxation, but so are all other charities even though restricted as to their beneficiaries and managed by private trustees. It is contended that, because Girard's will provided that the funds of the trust should be held and invested by the city treasurer and that an annual financial accounting should be presented to the legislature, this pointed to a public institution, but this argument loses sight of the fact that the will provided that none of the monies of the trust were at any time to

3. The fact that a charity is restricted in its beneficiaries to a specific religious group does not make it any the less a "purely public charity" entitling it to tax exemption under the laws of the Commonwealth: *The Burd Orphan Asylum v. The School District of Upper Darby*, 90 Pa. 21. This question, however, is not involved in the present case; the Girard College has been properly exempt from taxation since its creation.

4. In *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F.2d 212, the library there involved was given by the donor to the city, which owns and almost entirely maintains it on city-owned land; it is now the public library of Baltimore. Moreover no violation of any provision of the donor was involved in that case.

apply to any other purposes than those prescribed by the testator and that separate accounts distinct from any other accounts of the city should be kept by it; it must also be remembered that the city in its own right was a secondary beneficiary of part of Girard's residuary estate, so that it had an independent interest of its own to protect, wholly apart from its status as fiduciary. Petitioners point out that two of the provisions of Girard's will have in fact been disregarded by the courts, the one, that no part of his real estate in Pennsylvania should ever be sold but should be rented out from time to time on leases not exceeding five years. It is true that there were some sales made under the authority of the Orphans' Court but only because the income of the trust had shrunk to a point where the college could not be efficiently maintained and therefore the sales were the only recourse open in order to preserve the purposes of the trust; this was purely an administrative matter, sanctioned by law, and involving no change or violation whatever of any of the substantive provisions or objects of the trust, and the same is true of the authority given by the court to execute leases for fifteen years of certain mine properties, it having been found impossible to secure good tenants on shorter term leases.

[*Board of City Trusts*]

By the Act of June 30, 1869, P.L. 1276, the administration of all charitable trusts confided to the City of Philadelphia was thenceforth to be in the charge of a board composed of fifteen persons, including the mayor of the city, the presidents of the councils, and twelve other citizens appointed by certain judges—now by the judges of the Court of Common Pleas of the County of Philadelphia. From that time on the Girard trust estate, as well as all the other charitable trusts of which the city is the trustee, has been managed exclusively by this Board. The Act was upheld as to its validity in *Philadelphia v. Fox*, 64 Pa. 169, where the policy it represented was described (p. 183) as "having such a board dissociated from the general government of the city." Thus the administration of the city's fiduciary duties was completely divorced from that of its ordinary governmental functions. That the framers of the Philadelphia Home Rule Charter and all the people of the city who by their vote adopted it in 1951 so

understood this separation of the Board of Directors of City Trusts from any connection with the governmental powers of the city is shown by the fact that the Charter provides, section A-100, that it should "not apply to the Board of Directors of City Trusts and to any institutions operated by it," the annotation thereto of the Charter Commission being that "The Board of City Trusts is generally not dealt with by the Charter to protect its special status as a trustee." In other words, the Charter, which is comprehensive and all-embracing in its provisions for the government of the City of Philadelphia, expressly excludes the Board of Directors of City Trusts as a part or arm of that government and completely dissociates it in line with the statement in the *Philadelphia v. Fox* case above quoted.<sup>5</sup> The treasurer of the city serves as treasurer of the board and the mayor and president of the city council were made members of the Board obviously because, as hereinbefore stated, the city itself, as a secondary beneficiary of the trust estate, has an interest in the management and protection of its funds; the Board must account, not to the city government, but to the Orphans' Court for the performance of its duties as trustee, the same as any other trustee; (*Wilson, Mayor, v. Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588). It is of interest to note that if the city itself had considered the Board to be an agency of its public government and subject to its control it could, and no doubt would, have exercised its resulting authority by directing the Board to admit these applicants to the college, instead of which, recognizing that it was merely a fiduciary, it petitioned the Orphans' Court for that purpose. And it is further to be observed, in that same connection, that the Board filed an Answer to the city's Petition, thus evidencing the complete severance between the city in its ordinary municipal or governmental capacity and the Board of Directors of City Trusts administering the trusts confided to the city as trustee.

[*Other Trust Activity*]

The City of Philadelphia has been appointed at various times during a period of over two hundred years as trustee of many charitable trusts in addition to that created by Stephen

5. Likewise the Act of June 25, 1919, P.L. 581, to provide for the better government of the City of Philadelphia, did not include the Board of City Trusts as a part of the city's governmental structure.

Girard; they are said to number 89 in all at this time, and it is wholly impossible to conceive that the donors and testators had the slightest idea in appointing the city as a trustee of their charitable trusts that it could ever be contended that they were thereby subjecting their trusts to the governmental powers of the city and to the danger of their trusts being thereby invalidated or impaired which would not have been the case had they appointed a trust company or an individual as trustee. It would seem entirely clear, viewed from any and all angles, that the administration of the Girard trust by the Board of Directors of City Trusts does not in the slightest degree represent "State action" which would bring the present situation within the ambit of the Fourteenth Amendment.

#### [*Substitution of Trustee*]

But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in "State action" in the administration of the Girard trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee. It is hornbook law, pronounced over and over again by the decisions of this court and presumably by those of all other jurisdictions, that, as stated in *Girard v. Philadelphia*, 74 U.S. (7 Wallace) 1, 13: "Now, if this were true [that the city could not act as trustee] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee." Already in the first attack on the trust the Supreme Court in *Vidal et al. v. Stephen Girard's Executors*, 43 U.S. (2 Howard) 127, 188, had said: "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation [here the City of Philadelphia] was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the

proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." The incompetency of a trustee does not destroy the trust nor affect its validity or enforceability. No bequest or devise for a charitable use is void or in any manner impaired because given to a person or corporation incapable, for any reason, of acting as trustee or carrying out its terms; in such a case it is for the court to appoint a trustee to administer its provisions: *Frazier, Trustee, v. St. Luke's Church*, 147 Pa. 256, 23 A. 442. It was stated in the opinion in that case (p. 260, A.p. 442) that the 10th section of the Act of April 26, 1855, P.L. 331, that "no disposition of property hereafter made for any religious, charitable, literary or scientific use, shall fail for want of a trustee, . . . but it shall be the duty of the orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, . . ." was "merely declaratory of the law as it had existed and been enforced by the courts of chancery in England for hundreds of years." In *Toner's Estate*, 260 Pa. 49, 54, 55, 103 A. 541, 543, it was said: "It is a cardinal maxim in the courts of chancery, upon this subject, that a trust will not fail for want of a [faithful] trustee," citing many cases. In *Abel, Trustees, v. Girard Trust Company, Trustee*, 365 Pa. 34, 40, 41, 73 A.2d 682, 685, it was said: "It is unnecessary to consider whether the Association, chartered under the Act of 1874, April 29, P.L. 73, 15 PS 1 et seq., had the power and authority to act as trustee of a charitable trust. The familiar rule is that a charitable trust will not fail for want of a trustee," citing many authorities.

#### [*Dominant Purpose of Trust*]

Realizing, as they must, that their attempt to establish that the City of Philadelphia cannot, by reason of the Fourteenth Amendment, continue to carry out the provisions of the Girard will in reference to the prescribed beneficiaries of the trust would, even if successful, be a Pyrrhic victory because it could result only in another trustee being appointed for that purpose, petitioners argue that the limitation of the beneficiaries of the "Orphan Establishment" to white orphan children was a relatively unimportant matter in Girard's mind, and that his "dominant" purpose was that the City of Philadelphia should be the trustee. Not only is this, at best, mere speculation, but the most casual consideration of the terms of the will shows

that the exact opposite is the truth. Who can tell better than Girard himself what his "dominant" purpose was? In his will he said, "I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds." And he further said, after speaking of his devotion of the fund to the prosperity of the city, that this was to take place only "after providing for the College as hereinbefore directed, as my primary object." His secondary objects, as he stated them, were the improvement of the city's police force, the property and general appearance of the city, and the diminution of the burden of taxation. He provided that even if the city should violate any of the conditions of the will the income from his real estate in the City of Philadelphia was nevertheless to be forever applied to maintain the college. His voice therefore, on this point, speaks from the grave. Indeed, if speculation were to be indulged in, it is obvious that he wished the institution he was creating to be perpetual,—in fact he says so,—and that therefore he required a perpetual trustee, but at that time there were no trust companies, such as those with which we are now so familiar, existing in Philadelphia.<sup>6</sup> Accordingly, if he wanted, as he undoubtedly did, to obtain an immortal trustee, he had no other resource but to choose the City of Philadelphia. Incidentally, appellants have apparently not been able to find any case—they have cited none—where the identity of the named trustee was held to be more important than that of the beneficiaries of the trust as provided in the deed or will.

#### [*Cy Pres Doctrine*]

Petitioners make much in their argument of the proposition that the doctrine of *cy pres* ought to be applied in this case by omitting the word "white" in the will. As previously stated, they belittle the importance in Girard's mind of this provision, claiming that the only reason for it was that at the time he executed his will negroes were slaves and therefore it never occurred to him that they could or should be admitted into such an orphanage or educational institution. However, slavery had been

abolished in Pennsylvania by the Act of March 1, 1780, 1 Sm. L. 492, and there were said to be at that time 15,000 negroes in Philadelphia who were free, not slaves. There is no need whatever in the present case for the application of the doctrine of *cy pres*, because that doctrine applies only if it has become impossible or impracticable to carry out the objects of a trust; here there is no such situation for the trust can be enforced according to its literal terms as it has been for well over a hundred years. To continue to execute it in compliance with the exact directions of Girard's will has not become either impossible or impractical, nor, as has been pointed out, illegal. There is no shortage of poor white male orphans between the ages of six and ten; on the contrary there are more qualified applicants than can be accommodated. To sanction a change of the express terms of the will of Stephen Girard, in which he exercised his inalienable right to declare who the beneficiaries of his charity were to be, would, in the opinion of the court, be a wholly unwarranted and improper decision, unjustified by any principle of applicable law.

Decrees affirmed, each of the parties to bear his or its own costs.

Mr. Justice Bell files a Concurring opinion and Mr. Justice Musmanno files a Dissenting opinion.

#### [*Concurring Opinion*]

BELL, J.

Stephen Girard left (most of) his enormous estate to establish a perpetual orphan home and college for "poor white male orphans". I fully agree with everything that Chief Justice STERN has said in his exceptionally able opinion. However, since appellants, in order to convert a private charitable orphanage establishment into a publicly owned and publicly sustained public school, i.e., "a segregation case", have distorted the plain language and the clear meaning of Girard's will, as well as the principles and legal effect of numerous authorities, I deem it wise to further analyze and to refute more comprehensively and in greater detail their conjectural, as well as their plausible, but unsound contentions.

The two principal and very important questions raised by the record and the six voluminous briefs filed in this appeal are: What was

6. James G. Smith, in his book on "Trust Companies in the United States," speaks (p. 233) of the age-long "search for a continuous trustee."

Girard's dominant intent and can it be lawfully carried out?

Two young colored male orphans, between the ages of six and ten years, sought admission to Girard College. There are approximately 1137 poor white male orphans housed, fed, clothed, maintained, instructed and reared each year in Girard College and the number of such applicants always has exceeded the capacity of the College. The Orphans' Court of Philadelphia County in two very able opinions, one by Judge BOLGER and the other by Judge LEFEVER, dismissed the applications because the admission of these boys was not authorized under Girard's will.

#### GIRARD'S WILL

The will of Stephen Girard, dated February 16, 1830, has become a national landmark in the history of Trusts, and Girard College, which was the heart and soul of his thirty-two page will, has become an admired institution throughout our Country.

Stephen Girard prepared his will with the utmost care. He was an exceptionally able, intelligent man, and he had the advice of one of the leading lawyers of his time. The evidence shows that they shut themselves in a room and discussed the proposed will and its contents for five weeks. In his will Girard specified in lengthy and minute detail how he wished the College to be built and maintained, and the purpose to which it was to be devoted. He said as clearly as the English language will permit that this was to be a College and a Home for "poor white male orphans" who were to be admitted between the ages of six and ten and remain until they respectively arrive at between fourteen and eighteen years of age. He prescribed their food, their dress, their educators, their instruction in various branches of education, their seclusion and restraint from the rest of the world, as well as from their parents, clergymen and priests, and he specifically said that the provisions for the College were "my primary object".

If any language is clear and plain and unmistakable as to who should be admitted to the College, Girard's language is clear and plain and unmistakable. He was creating an "orphanage establishment", a home and college not for poor girls and boys, not for orphan boys, not for red or brown or yellow or black orphans, not

even for all orphans—he created in the clearest imaginable language an orphan home and college for "poor white male orphans".

#### [Other Gifts]

Girard first made a gift to the Pennsylvania Hospital of \$30,000. to pay to his "black" woman, Hannah, to whom by his will he gave her freedom, the sum of \$200. a year, and the balance to be used for the sick in the Hospital. He then gave the sum of \$20,000. to the Pennsylvania Institution for the Deaf and Dumb for the use of that Institution. He then gave \$10,000. to The Orphan Asylum of Philadelphia for the use of that Institution. He did not limit these gifts to white people. He then gave \$10,000. to the Comptrollers of the Public Schools for the City and County of Philadelphia for the use of the schools upon the Lancaster system. He then bequeathed to the Mayor, Aldermen and Citizens of Philadelphia the sum of \$10,000. to distribute the income among poor white housekeepers and roomkeepers of good character residing in the City of Philadelphia. He then gave \$10,000. to the Society for the relief of poor and distressed masters of ships, their widows and children. He then gave \$20,000. to the Masonic Loan in trust for the Grand Lodge of Pennsylvania. He then gave \$6,000. for the purchase of land, one part thereof for poor white male children and the other part for poor white female children of Passyunk Township. He then made very small pecuniary gifts and devises to members of his family and friends. He then made a gift to his captains and to those who were bound to him by indenture as apprentices or servants. He then devised one-third of his real and personal estate near Washita in the State of Louisiana to the Corporation of the City of New Orleans, for such uses and purposes as the Corporation may consider most likely to promote the health and general prosperity of the *inhabitants* of the City of New Orleans.

In Paragraph XX he said:

"And whereas I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are

exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution,<sup>1</sup> a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate (the real estate in Pennsylvania charged as aforesaid) unto 'The Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned . . .'"

He provided in the remainder of Paragraph XX that the rents, issues and profits should be used to keep that part of the City constantly in good repair.

We then come to the most pertinent provision of the will, Paragraph XXI. In this paragraph testator gave \$2,000,000 of the residue of his personal estate "in trust [to erect] as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets and Eleventh and Twelfth streets,<sup>2</sup> in the city of Philadelphia (which square of ground I hereby devote for the purposes *hereinafter stated, and for no other, forever*) a permanent College, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established; . . .". He provided in very minute detail (through seven pages) the design, the material and the manner in which the buildings were to be erected. When the college and appurtenances shall have been constructed and properly furnished, he directed that the balance of \$2,-

1. Italic throughout, ours.

2. By his codicil dated June 20, 1831, he changed the situs of his "Orphan Establishment" to its present location.

000,000., and subsequently the remainder of his residuary personal estate shall be applied to maintain the said college according to his directions. "3.<sup>3</sup> As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced."

In Paragraph XXII of his will Girard gave \$500,000. for the repair and improvement of the streets of Philadelphia fronting on the River Delaware and of certain buildings therein, and for the widening and paving of Water Street.

In Paragraph XXIII of his will he gave to the Commonwealth of Pennsylvania \$300,000. for internal improvements by canal navigation.

In Paragraph XXIV of his will Girard provided that the remainder of his residuary personal estate shall be applied:

"1. To the further improvement and maintenance of the aforesaid College as, directed in the last paragraph of the XXIst clause of this will.

"2. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, . . . .

"3. To enable the said corporation to improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it. . . .

"To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever-after providing for the College as *hereinbefore directed, as my primary object.*"

Girard then provided that if the City knowingly and wilfully violated any of his testamentary conditions, he bequeathed the said remainder to the Commonwealth of Pennsylvania for the purposes of internal navigation "excepting, however, the rents, issues and profits of my real estate in the City and County of Philadelphia *which shall forever be reserved and applied to maintain the aforesaid college*

3. 1 and 2 dealt with instructors.

in the manner specified in the last paragraph of the XXIst clause of this will".

Testator then provided that if the Commonwealth failed to apply his bequests to the uses and purposes he mentioned, he devised the remainder to the United States of America for the purpose of internal navigation and no other—"the rents aforesaid *always excepted and reserved for the College* as aforesaid." First and foremost was always the College!

#### [Dominant Intent]

It is impossible for any unbiased person to read Girard's will without being convinced that *his specific, as well as his primary and dominant and paramount intent*, was to provide a college and orphanage home for "poor white male orphans". Girard not only *specifically* said so twice in his residuary trust provisions or bequests, but in all gifts or provisions pertaining to his residuary estate, the College was placed above everything else as the primary object of his heart and bounty. The language describing and defining the class of beneficiaries, namely, "poor white male orphans" is so clear, plain, certain, unambiguous and unmistakable, that it seems incredible that it is now contended that "white" does not mean "white"—it means white and black and yellow and brown.

#### [Appellants' Contentions]

Before discussing the many cases which for a period of over 100 years have sustained Girard's testamentary orphanage establishment for poor white male orphans, we shall dispose of those contentions of appellant which are so far-fetched as to be entirely devoid of merit.

Appellants contend that the City of Philadelphia was the primary object of testator's bounty. A study, nay a reading, of Girard's will quickly demonstrates that there is absolutely nothing in the will to support this theory, and that it is completely contrary to what Girard specifically and repeatedly said therein.

Appellants contend that Girard was interested in and wanted to aid the City of Philadelphia and the poor people of Philadelphia and therefore he must have wanted white and black orphans and *all poor people* of Philadelphia admitted to this orphanage establishment. Girard in several paragraphs of his will not only said he was interested in and wanted to aid the City of Philadelphia and the poor people thereof,

but he specifically did exactly that in a number of bequests in his will which have been hereinabove recited. Of course it is a *non sequitur* to say that because he wanted to aid the City and the poor, he must therefore have wanted all orphans, or black and white orphans, or all poor people of Philadelphia admitted to the college, *when he specifically said something entirely different*.

Perhaps the most far-fetched and fantastic contention which was vigorously urged upon us was that if Girard had foreseen the Civil War and the subsequent Constitutional Amendments, particularly the Fourteenth Amendment, and certain recent decisions of the Supreme Court of the United States, and had lived in these modern times when colors and races intermingle and fraternize, he would have desired Girard College to be a college for all poor male orphans (or for all the poor people of Philadelphia) without distinction for race, creed or color.<sup>4</sup> Those conjectures or contentions are merely wishful thinking or fantasies; none of them have any sound basis or merit whatsoever. Respected men and women, as well as eccentric people, sometimes make sound and sometimes eccentric wills. Courts, heirs and excluded beneficiaries often wish (1) they could change or delete clear and plain and specific language, or (2) rewrite a will to expand or change the testator's bounty in order to conform to what they believe would be fairer or wiser, or to conform to what they think the testator would have said if he had foreseen the existing facts and circumstances. But that is not and never has been the law of Pennsylvania!

"... it is and always has been the law of Pennsylvania that every individual may leave his property by will to any person, or to any charity, or for any lawful purpose he desires, unless he lacked mental capacity, or the will was obtained by forgery or fraud or undue influence, or was the product of a so-called insane delusion. While it is difficult for many people to understand how or why a man is permitted to make a strange or unusual or an eccentric bequest, especially if he has children or close relatives living, we must remember that under the law of Pennsylvania, 'a man's prejudices are a part

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4. It was even argued that you could not be a good American citizen unless you went to a school composed of whites and colored.

of his liberty'. He has a right to the control of his property while living, and may bestow it as he sees fit at his death. McCown v. Frazer, 327 Pa. 561, 192 A. 674; Cauffman v. Long, 82 Pa. 72'; Johnson Will, 370 Pa. 125, 87 A. 2d 188.

In Cannistra Estate, 384 Pa. 605, 121 A. 2d 157, this Court said:

"No rule regarding wills is more settled than the great General Rule that the testator's intent, if it is not unlawful, must prevail! This is the reason why so many cases continually proclaim that the pole star in the construction of every will is the testator's intent. Moreover, "The testator's intention must be ascertained from the language and scheme of his will: . . . it is not what the Court thinks he might or would have said in the existing circumstances or even what the Court thinks he meant to say, but what is the meaning of his words": Britt Estate, 369 Pa. [450, 454, 87 A. 2d 243]': Sowers Estate, 383 Pa. 566, 119 A. 2d 60.

" . . .

"The language of Mr. Justice STEARNE, speaking for the Court in Borsch Estate, 362 Pa. 581, 67 A. 2d 110, is particularly appropriate: 'We said, in Stoffel's Estate, 295 Pa. 248, 145 A. 70, p. 251: "One possessed of testamentary capacity, who makes a will in Pennsylvania, may die with the justifiable conviction that the courts will see to it that his dispositions, legally made, are not departed from by those charged with the duty of performance, . . ." This always has been and unless changed or modified by the legislature, should continue to be the wise salutary policy of the Courts of Pennsylvania regarding wills.'

Gifts to charity, outright or in trust, are favored by the law of Pennsylvania: Daly's Estate, 208 Pa. 58, 66, 57 A. 180; Jordan's Estate, 329 Pa. 427, 429, 197 A. 150; McKee Estate, 378 Pa. 607, 108 A. 2d 214. We have sustained charitable trusts for every conceivable charity—sectarian churches, hospitals and homes of all denominations, charitable gifts for denominational or sectarian ministers, for priests, for free masons, for aged couples, for aged Israelites, for widows, for all classes of society, and even for agnostic societies. Gifts to private schools and

colleges have been sustained as valid and constitutional. Cf. Pierce v. Hill Military Academy, 268 U.S. 510; Craig Estate, 356 Pa. 564, 52 A. 2d 650; Donohugh's Appeal, 86 Pa. 306; Hill School Tax Exemption Case, 370 Pa. 21, 87 A. 2d 259; Philadelphia v. Woman's Christian Association, 125 Pa. 572, 17 A. 475; Episcopal Academy v. Philadelphia, 150 Pa. 565, 25 A. 55.

In Craig Estate, 356 Pa., *supra*, testatrix's gift of \$25,000. to the Trustees of the Central Presbyterian Church, to be retained as a permanent fund and the income used in keeping the church properties in order and for such other church purposes as the trustees may direct, was sustained even though the church dissolved and a new or substituted trustee was appointed by the Orphans' Court. The Court said: "Where a gift is made directly to a charitable or religious body for purposes which are within the powers of the corporation, it is a trustee for itself, and holds for the purposes specified in the gift. It is, however, a trust in the sense that the fund does not merge into the general property of the corporation but remains under the jurisdiction of a court of Equity. Equity has power to define the trust and to restrain any violation of it. See Wilson v. Board of City Trusts, 324 Pa. 545.

" . . .

"In Pennsylvania the control and disposition of church property is subject to the rules and regulations of the religious body to which the church belongs: Act of June 20, 1935, P.L. 353, 10 PS 81; Canovaro v. Brothers of St. Augustine, 326 Pa. 76; but both that act and the decision cited recognize that donations and gifts in trusts lawfully established by wills or reserved in writing must be preserved and given due effect; an all-sufficient reason being given in Brown v. Hummell, 6 Pa. 86, 95, namely, that the hand of private benevolence be not stayed and checked by the conviction that the will of the donor may not be preserved."

In Pierce v. Hill Military Academy, 268 U.S., *supra*, the Court said, (page 514): "This Court, like the court below, must know that the true purpose of the act, as well as its plain and intended practical effect, was the destruction of private primary, preparatory and parochial schools; for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades.

Such drastic and extraordinary legislation is a portentous innovation in America. Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it today, dates only from 1840. For generations all Americans—including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States—were educated in private or religious schools, and mostly the latter. Perhaps no institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from the very beginning of our history. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions. In more recent times commonwealth colleges and universities have grown up. The legislation before the court manifestly carries within itself a threat, not merely to the private elementary and preparatory schools which it now practically prescribes, but to every private or religious preparatory school and every private or religious college or university in the land."

The right to dispose by will of one's property is one of the most treasured rights of an American citizen, and if the will does not violate the law, not even the legislature can pervert or destroy a man's validly executed will: *Brown v. Hummel*, 6 Pa. 86, 95.<sup>6</sup>

#### *[Discrimination by Will]*

Appellants argue that Girard's will discriminates against negroes. It could just as readily be argued, and it would be just as irrelevant, that it similarly discriminates against all girls—white, red, yellow, brown and black—against white boys who are not orphans,—against white boys who are not poor,—as well as against all poor boys who are not born in Philadelphia. The fact that a testator prefers to leave his money by

will, or limit and restrict his testamentary bequests to some of his children, or to some of his relatives instead of to all of his children, or all of his relatives, or to a church or charity instead of to his relatives, or for people suffering with certain diseases, or for aged Protestants, or "for the poor of the German Lutheran Congregation", or for the "Roman Catholic Church of Saint Coleman for its own uses and purposes", or to a named Catholic priest or church for the poor of that parish, or for a named sectarian Orphanage, or for a sectarian or denominational church or home or charity or for any charitable purpose, does not constitute discrimination in its legal meaning. In *Wharton Appeal*, 373 Pa. 360, 369, 96 A. 2d 104, the Court said: "A testator . . . may exclude any one whom he wishes, except a surviving spouse. The reason for the exclusion need not be stated by testator and will not be passed upon by a court . . ."

It is indisputable that nearly every charitable bequest excludes more than half of the public, but it does not for that reason cease to be a valid charitable gift, or be unconstitutional, or become the property of the State or Municipality in its governmental capacity.

#### A CENTURY OF INTERPRETATION BY PARTIES AND COURTS

Not only is Girard's will crystal clear that he wished, meant, said and intended that only "poor white male orphans" should be admitted to Girard College, but that very interpretation and construction has been placed upon this testamentary provision of his will for over 100 years (1) by those who have administered and managed the trust estate for Girard College (which now amounts to approximately \$98,000,-000.), and (2) by the Supreme Court of the United States, and (3) by the Supreme Court of Pennsylvania, and (4) by the lower Courts of this Commonwealth, and (5) by the present appellant—the City of Philadelphia.

It is very important to note that this is a privately founded and privately endowed charity—an "orphanage establishment", a college and home for orphans—*poor white male orphans*. Girard College is not and never was a government owned piece of real estate or building or public college; it was not constructed and it is not and never was maintained by the State, the City or its agents from tax money or public funds, nor has the public as such ever been ad-

5. See also: *Crawford Estate*, 362 Pa. 458, 67 A. 2d 124; *Warden Trust*, 382 Pa. 311, 314-315, 115 A. 2d 159; *McKean Estate*, 366 Pa. 192, 77 A. 2d 447; *Borsch Estate*, 362 Pa. 581, 67 A. 2d 119; *Willcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581, 55 A. 2d 521.

mitted. Girard College was built on land owned by Girard, with Girard's own money, and every dollar of its construction, maintenance and upkeep, and the salaries or wages of its teachers and employes, and the food, clothing, lodging, maintenance and education of its boys have been paid by and from the private funds of a private citizen, Stephen Girard. We repeat, neither the City of Philadelphia nor the Commonwealth of Pennsylvania nor the Government of the United States have ever paid or contributed one cent toward the construction or maintenance of the College, or the salaries of its teachers, or the feeding, clothing, maintenance or education of any of the orphan boys who live and study therein.

Perhaps equally important, Girard College was never administered by the City in its governmental or sovereign capacity. It was administered originally by the Mayor, Aldermen and Councils, and subsequently by an independent agency created by the Legislature *solely in the capacity of a fiduciary or trustee governed, bound and limited by the directions and provisions of Girard's Will.*<sup>6</sup>

Today neither the Mayor of Philadelphia nor any of the departments under him, nor City Council administers, manages or operates the orphanage known as Girard College in any capacity whatsoever. Today under the Philadelphia Home Rule Charter adopted April 17, 1951, effective January 7, 1952, neither Girard College nor its Board of Directors of City Trusts are included within the City government; on the contrary, the Board of Directors of City Trusts, which administers Girard's testamentary trust known as Girard College, is specifically excluded from the City Charter. Section A-100 of the Philadelphia Home Rule Charter provides:

"Except as otherwise specifically provided, this charter shall not apply to the Board of Directors of City Trusts and to any institutions operated by it." And the annotation thereto states:

"4. The Board of City Trusts is generally not dealt with by the Charter to protect its special status as a trustee."

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6. One of the basic fallacies of appellants is their failure to recognize the distinction between the City's actions in its governmental capacity and its actions in its capacity as a fiduciary or trustee.

[*Board of City Trusts*]

The Girard Trust is administered and managed by a Board of Directors of City Trusts which is composed of 14 members. Five leading business men, four leading lawyers, two leading bankers, a doctor, and ex-officio, the Mayor of Philadelphia and the President of City Council. The Board of Directors is not selected or elected or appointed by the Mayor or by City Council or by the citizens of Philadelphia—it is selected and appointed by the Judges of the Courts of Common Pleas of Philadelphia County and is, we repeat, a separate, independent entity which was specifically excluded from the Philadelphia City Charter.

[*City's Status as Trustee*]

When the City of Philadelphia administered Girard College, it administered it in the capacity, not of a government or sovereign dealing as it wished with its own public property, but *solely as a fiduciary trustee to carry out the directions of Girard's will by which it was limited and bound.* It was compelled under Paragraph XXIV of Girard's will to keep an account of his estate separate and distinct from all other monies and accounts of the City; it had to furnish annually to the Legislature an account so that a Committee of the Legislature could examine it and see that his estate was applied only to the purposes set forth in his will and that his "intentions had been fully complied with". The reason for Girard's appointment of the City as trustee is obvious. When Girard made his will in 1830 he naturally desired a perpetual trustee to carry out the wonderful and perpetual charitable orphanage and college he so earnestly desired and so minutely prescribed. Sitting in Girard's armchair, as we must do, to look at the attendant and surrounding circumstances,<sup>7</sup> Girard, an outstanding banker, must have known that there was not a single trust company in the City of Philadelphia<sup>8</sup> to act in

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7. McFadden Estate, 381 Pa. 464, 112 A. 2d 148; Wright Estate, 380 Pa. 108, 110 A. 2d 198; Edmonds Estate, 374 Pa. 22, 97 A. 2d 75; Kehr Will, 373 Pa. 473, 95 A. 2d 647; Britt Estate, 369 Pa. 450, 87 A. 2d 243.

8. The Pennsylvania Company for Insurances on Lives and Granting Annuities, now known as The First Pennsylvania Banking and Trust Company, was incorporated in 1812, but did not acquire trust powers until 1836. The Girard Trust Company, now the Girard Trust Corn Exchange Bank, was in-

the capacity of a perpetual trustee. That is, we repeat, the obvious reason why the City was appointed trustee.

A municipality, if it is authorized to do so by the Legislature, can act (1) in its sovereign or public or governmental capacity; (2) in its private or proprietary capacity, in which event it is considered a separate entity acting for its own private purposes and not as a subdivision of the State: Cf. Whiteoak Borough Authority Appeal, 372 Pa. 424, 93 A. 2d 437; Shirk v. Lancaster City, 313 Pa. 158, 169 A. 557; Western Saving Fund Society v. Philadelphia, 31 Pa. 175; Moore v. Luzerne County, 262 Pa. 216, 105 A. 94; Bell v. Pittsburgh, 297 Pa. 185, 146 A. 567; Madden v. Borough of Mt. Union, 322 Pa. 109, 185 A. 275; Gas & Water Co. v. Carlisle Borough, 218 Pa. 554, 67 A. 844; Commonwealth v. P.R.T. Co., 287 Pa. 70, 134 A. 452; Versailles Township Authority v. McKeesport, 171 Pa. Superior Ct. 377, 90 A. 2d 581; or (3) *in a fiduciary (trustee) capacity*, in which event it, like any individual or corporate trustee, is bound by and has only the powers and authority given it by the will or deed of trust: Vidal et al v. Girard's Executors, 43 U.S. 127; Girard v. Philadelphia, 74 U.S. 1; Philadelphia v. Girard Heirs, 45 Pa. 1; Philadelphia v. Fox, 64 Pa. 169; Philadelphia v. Elliott, 3 Rawle 170.

#### [Tests of Will]

Before the College was constructed, Girard's testamentary trust for the College was vigorously attacked by his heirs, but was sustained as a valid charitable trust by the Supreme Court of the United States in Vidal et al. v. Girard's Executors, 43 U.S. 127. The heirs were represented by Daniel Webster and other leading lawyers of that day. That case arose by a bill in equity to set aside Girard's testamentary trust for the College. Mr. Justice STORY said, *inter alia*:

"The persons who are to receive the benefits of the institution he declared to be,

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corporated in 1838. The Fidelity Trust Company, now the Fidelity-Philadelphia Trust Company, was incorporated in 1866. The Provident Trust Company was incorporated in 1865. The Real Estate Title Insurance Company, now known as Tradesmen's Bank and Trust Company, was incorporated as a title company in 1876 and first acquired trust powers in 1889. These were the first trust companies in Philadelphia and their importance trustee-wise is further evidenced by the fact that in 1847 the Pennsylvania Company had total trust assets of only \$176,000.

'poor white male orphans between the ages of six and ten years; . . . . The principal questions, to which the arguments at the bar have been mainly addressed, are; First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college *upon the trusts and for the uses designated in the will*: Secondly, whether these uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania: . . . . where the corporation has a legal capacity to take real or personal estate, there it may take and hold it *upon trust, in the same manner and to the same effect as a private person may do*. It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. *But that will furnish no ground to declare the trust itself void*, if otherwise unexceptionable; but it *will simply require a new trustee to be substituted by the proper court*, possessing equity jurisdiction, to enforce and perfect the objects of the trust. . . . In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. . . . We think, then, that the *charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes*, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania.

" . . . .

"We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary na-

ture, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

" . . .

"Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. . . .

"This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same: and Secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion."

In Girard v. Philadelphia, 74 U.S. 1—which was an action of ejectment where the issue was the meaning and validity of Girard's will—the Supreme Court of the United States again sustained the validity of Girard's testamentary trust for the orphanage college and again pointed out that the College was the primary object of his bounty. The Court said, *inter alia*:

" . . . the attempt to restrain the alienation of the realty, being inoperative, could not affect the validity of the devise,<sup>9</sup> and that the income of the whole residuary was devoted to the three objects stated by the testator, *the college being the 'primary object,'* and that so long as any portion of

9. The same question is raised again in the instant case and was raised and decided adversely to the appellants in Girard Estate, 73 D. & C. 42.

this residuary fund should be found necessary for 'its improvement and maintenance,' on the plan and to the extent declared in the will, *the second and third objects could claim nothing. . . .*

" . . . Now, it is admitted (for it has been so decided,) that till February, 1854, the corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, *subject to these charitable trusts*, and consequently, at that date, his heirs at law had no right, title, or interest whatsoever in the same. But the bill alleges that the act of the legislature of that date (commonly called the 'Consolidation Act'), which purports to be a supplement to the original act incorporating the city, has either dissolved or destroyed the identity of the original corporation, and it is consequently unable any longer to administer the trust. *Now, if this were true, the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee.*

" . . .

"Now, it cannot be pretended that the legislature had not the power to appoint another trustee if the act had dissolved the corporation, or to continue the rights, duties, trusts, &c., in the enlarged corporation. It has done so, and has given the widest powers to the trustee to administer the trusts and charities according to the intent of the testator, as declared in his will.

"The legislature may alter, modify, or even annul the franchises of a public municipal corporation,<sup>10</sup> although it may not impose burdens on it without its consent.

10. Unless authorized by the Constitution or by an Act of Assembly, cities and municipalities are not sovereigns; they have only such powers and such rights of legislation as are authorized by the Constitution or by an Act of the Legislature. Genninger v. New Castle, 368 Pa. 547, 549, 84 A. 2d 303; Kline v. Harrisburg, 362 Pa. 438, 68 A. 2d 182; Commonwealth v. Moir, 199 Pa. 534, 541, 49 A. 351; Murray v. Philadelphia, 364 Pa. 157, 71 A. 2d 280; Philadelphia v. Fox, 64 Pa. 169, 180; Trenton v. New Jersey, 262 U. S. 182; Hunter v. Pittsburgh, 207 U. S. 161; Pittsburgh's Petition, 217 Pa. 227, 66 A. 348. This was the reason why the City of Philadelphia had Acts passed by the Legislature in 1832 and 1847 to enable it to accept the gifts made in Girard's Will, viz., (a) to construct Delaware Avenue and repair wharves, and (b) "to appoint . . . agents . . . to carry out the . . . trusts created by the will of Stephen Girard."

In this case the corporation has assented to accept the changes, assume the burdens, and perform the duties imposed upon it; and it is difficult to conceive how they can have forfeited their right to the charities which the law makes it their duty to administer. *The objects of the testator's charity remain the same*, while the city, large or small, exists; *the trust is an existing and valid one*, the trustee is vested by law with the estate, and the fullest power and authority to execute the trust.

"... it cannot admit of a doubt that, where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator, if the corporation be dissolved, or, if not, by modifying or enlarging its franchises, *provided the trust be not perverted, and no wrong done to the beneficiaries*. Where the trustee is a corporation, no modification of its franchises, or change in its name, while its identity remains, can affect its rights to hold property devised to it for any purpose. *Nor can a valid vested estate, in trust, lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it*, if such existed. Charity never fails; and it is the right, as well as the duty of the sovereign, by its courts and public officers, as also by legislation (if needed), to have the charities properly administered.

"Now, there is no complaint here that the charity, *so far as regards the primary and great object of the testator*, is not properly administered; and it does not appear that there now is, or ever will be, any residue to apply to the secondary objects.

"...  
1st. The residue of the estate of Stephen Girard, at the time of his death, was, by his will, vested in the corporation *on valid legal trusts*, ...".

These cases completely answered and refute all of appellants' contentions.

The Courts of Pennsylvania have likewise repeatedly passed upon and sustained the validity of Girard's testamentary trust for this orphanage establishment or college for "poor

white male orphans" and have recognized it as the primary object of his bounty.

Girard's Will first came directly before this Court<sup>11</sup> in Soohan v. The City of Philadelphia, 33 Pa. 9. The Court there decided that a fatherless child is an orphan within the meaning of Girard's will and that a preference was to be given to those orphans born within the original corporate limits of Philadelphia, as laid out by William Penn, and existing at the death of the testator. Before coming to this conclusion, the Court, in an elaborate opinion, pointed out that *the orphans must be poor white male orphans between the age of six and ten years*. The Court, in reviewing Girard's will, said (page 22):

"Then follow ten paragraphs in which *he directs* how his college shall be organized and managed, and *what orphans shall be admitted into it*. They must be *poor white male orphans* between the ages of

11. As early as 1846, Girard's Will had become a landmark in the realm of charitable trusts. In Brown v. Hummel, 6 Pa. 86, testator devised his estate to trustees to establish an orphan home for the education of poor orphans. He provided in his Will how the succeeding trustees should be chosen. The legislature attempted by Act of April 21, 1846, to require the trustees to be chosen in a manner and by persons different from that set forth by the testator. The Court declared the Act to be unconstitutional and void and said, inter alia: "If the legislature, by ex parte enactment, can alter the will of a private individual, whose will shall escape? On whose will shall the hand of legislative innovation next be laid? ... What private charity will next be disturbed and invaded? The will of Stephen Girard offers a conspicuous mark. How many charities in the character of hospitals, asylums, and schools, in the state, are exposed to the same peril as the charity created by the will of George Fry? If the legislature can alter one man's will, by license of the constitution, they can alter the will of every man." If the legislature cannot alter a man's will, certainly the City, which is an agent of the legislature, cannot do so.

In Benjamin Franklin's Administratrix v. City of Philadelphia, 2 D.R. page 435, the lower Court sustained a charitable gift by Franklin to the inhabitants of Philadelphia in trust to pay the income for the benefit of apprentices with gifts over thereafter. That Court, speaking of Girard's trust for the orphanage College, said: "... yet only a class, and that a small class of the people can obtain the benefit of it. Girls are excluded; boys whose fathers are living are excluded; men and women are excluded; in short, all but 'poor white male orphans' are excluded. Nevertheless, it is a great charity, and withstood numerous and persistent attacks in the courts of Pennsylvania and of the United States, until now it is fixed, firm, and as immovable as a rock: Vidal v. Girard's Executors, 2 Howard, U. S. 127; Philadelphia v. Girard's Heirs, 45 Pa. 9; Girard v. Philadelphia, 7 Wallace, 1."

six and ten years, and must be bound to the corporation of the city. Priority of application to entitle to preference, all other things concurring; if more applicants than vacancies preference shall be given, 'First, to orphans born in the city of Philadelphia; Secondly, to those born in any other part of Pennsylvania; Thirdly, to those born in the city of New York (that being the first port on the continent of North America at which I arrived); and lastly, to those born in the City of New Orleans, (being the first port on the said continent at which I first traded in the first instance, as first officer, and subsequently as master and part owner of a vessel and cargo.)'"

In *City of Philadelphia v. Girard Heirs*, 45 Pa. 1, the testamentary trust for the College was again attacked and sought to be voided because of (a) the provision against alienation of the real estate and (b) the provision for accumulation. This Court held that even if the subordinate provisions against alienation and accumulations were invalid, this would not destroy the validity of the testamentary trust for the College. In that case this Court once again pointed out that Girard's testamentary trust for the College had been sustained, against vigorous attacks, by the Supreme Court in *Vidal v. Girard's Executors*, 43 U.S., supra. This Court in its opinion said, pages 25-28:

"In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency.

"There is no sort of difficulty in making

an analysis of the relevant parts of this will in accordance with this distinction.

"It is a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, in trust, *as his 'primary object'*, to construct, furnish, constitute, and maintain the institution now known as the Girard College, and then for certain municipal purposes, not necessary to be now specified....

"4. Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable; but this does not annul the gift. The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention: 7 Ves. 69; 4 Id. 329; 14 Simons 232; 17 S. & R. 91; 1 M. & W. 287.

"5. And this is the doctrine of *cy pres*, . . . a reasonable doctrine, by which a well-defined charity, or one where the means of definition are given, may be enforced *in favor of the general intent*, even where the mode of means provided for by the donor fail by reason of their inadequacy or unlawfulness."

Girard's Will next came before this Court in *Philadelphia v. Fox*, 64 Pa. 189. The legislature passed an Act of June 30, 1869, providing for a separate body of citizens *for the administration of trusts* vested in the city, to be known as the Board of Directors of City Trusts. The City contested the constitutionality of this Act and contended, *inter alia*, that the legislature could not take away the property of the municipal corporation without payment, and that every citizen of Philadelphia and every owner of property in the territorial limits in the old city of Philadelphia had a pecuniary interest in the devise of Mr. Girard. The City's contentions were rejected by this Court which, speaking through Justice SHARSWOOD, said, *inter alia*:

"The City of Philadelphia is beyond all question a municipal corporation, that is, a public corporation created by the government for political purposes, and having

subordinate and local powers of legislation: 2 Kent's Com. 275; an incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government: Glover Mun. Corp. 1. It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—having no vested right to any of its powers or franchises—the charter or act of erection being in no sense a contract with the state—and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion.

" . . .

*"Such a municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but only as it seems for public purposes, germane to its objects: . . ."*

" . . . When, therefore, the donors or testators of these charitable funds granted or *devised them in trust* to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the state, an agent acting under a revocable power. Substantially they trusted the good faith of the sovereign. It is plain—too plain, indeed, for argument, that the corporation by accepting such trusts, could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, *which is made a trustee of a charity*, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the state from changing it as the public interests may require: Montpelier v. East Montpelier, 29 Verm. 21. This whole question is put at rest, and that as to one of the most important of these trusts and as to this trustee, by the opinion of the Supreme Court of the United States in Girard v. Philadelphia, 7 Wallace 14: 'It cannot admit of a doubt,' says Mr. Justice Grier, 'that where there is a valid devise

to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator if the corporation be dissolved, or if not, by modifying or enlarging its franchises, *provided the trust be not perverted, and no wrong done to the beneficiaries.*'

#### CY PRES

The doctrine of cy pres is totally inapplicable in the instant case because that part of the will which appellants attack, namely, testator's dominant intent to establish a home and college for "poor white male orphans" is clearly and unmistakably declared and can be literally and lawfully carried out. Appellants have completely misunderstood the doctrine of cy pres and when and for what purpose it will be applied. Cy pres is a well recognized equitable doctrine which is applicable when the object of a charitable bequest is not clear, or testator's dominant purpose and intent can not be literally and lawfully carried out, or when one or more of the directions concerning the charitable gift or the subordinate purposes or administrative provisions cannot be literally or lawfully carried out. In such an event the Courts sustain the charity and all the provisions which are ascertainable and valid, and apply the bequest as well as the subordinate or administrative provisions of the will as nearly as possible to testator's general dominant intent.

14 Corpus Juris Secundum, Charities, §52, page 512, aptly and accurately states:

#### §52.—Cy Pres Power as Judicial Function

##### a. Definition and Nature

Cy pres means 'as near to', and the doctrine is one of construction, the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be *where it cannot be done to the letter.*"

Williams Estate, 353 Pa. 638, 46 A. 2d 237, furnishes an accurate exposition and a proper application of cy pres. In that case, testatrix left her residuary estate in trust to establish a charitable home in the dwelling house she occupied and the adjoining grounds contiguous thereto for aged women who were unable to support themselves. The prospective benefici-

aries were limited to residents of the County of Tioga, Pa. The residuary estate was insufficient for the purpose of carrying out testatrix's intent in the exact manner prescribed as recited above. The Orphans' Court applied the cy pres doctrine and awarded the residuary estate to the Soldiers and Sailors Memorial Hospital for the approximate charitable uses which testatrix specified. The Court said:

" . . . The case therefore properly calls for an exercise of the court's cy pres power to prevent a failure of the testatrix's general charitable intent.

"However, as we said in Wilkey's Estate [337 Pa. 129], at pages 132-133,—'In applying the principle of cy pres the court does not arbitrarily substitute its own judgment for the desire of the testator, or supply a fictional testamentary intent, but, on the contrary, it seeks to ascertain and carry out as nearly as may be the testator's true intention; . . . .'"

In Wanamaker Estate, 364 Pa. 248, 72 A. 2d 106, where the fund was inadequate for the exact purpose designated by the testator, the doctrine of cy pres was wisely applied and the Court said, *inter alia*:

" . . . When a court applies the doctrine of cy pres it is not thereby arbitrarily substituting a beneficiary in place of the one designated by the testator, nor is it substantially altering the testamentary intent; on the contrary, it is carrying out that intent in its broader outlines in accordance with the testator's more fundamental wishes as the court interprets them. . . . "

It is unnecessary to review additional authorities or to cite the many cases enunciating or dealing with the doctrine of cy pres in order to demonstrate what every student of the law of wills knows, namely, cy pres is never applicable to destroy a charitable bequest or a charitable trust, or to pervert or defeat testator's dominant intent, as appellants would have us do in the instant case by omitting the word "white".

#### CITY HOLDS THE GIRARD ESTATE, NOT IN ITS GOVERNMENTAL CAPACITY, BUT IF AT ALL, ONLY IN ITS FIDUCIARY CAPACITY

It is, beyond any question, clear from Girard's

Will that the City held Girard's residuary trust estate for the College *only in a fiduciary capacity*—that is as trustee for the persons, uses, purposes and trusts which were clearly set forth, defined and limited in Girard's Will. One of appellants' fundamental fallacies is their failure to recognize that the City can act in a fiduciary capacity as distinguished from a governmental capacity, and that with respect to Girard College (as also with respect to 88 other trusts) it is acting *solely as a trustee*. Appellants likewise fail to realize that the manifold activities performed by the City in connection with Girard College are performed not in its governmental capacity, but in its capacity as trustee. We again emphasize that the Supreme Court of the United States expressly held in *Vidal v. Girard's Executors*, 43 U.S. 127, *supra*, that the City of Philadelphia took the bequest for the erection and support of Girard's orphanage establishment "*upon the trusts* and for the uses designated in the will . . . . . the charter of the city does invest the corporation with powers and rights to take property *upon trust for charitable purposes*, . . . . . where the corporation [the City] has a legal capacity to take real or personal estate, there it may take and hold it *upon trust, in the same manner and to the same effect as a private person may do*. It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, . . . that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but *it will simply require a new trustee to be substituted* by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

In *Girard v. Philadelphia*, 74 U.S., *supra*, the Court again said: ". . . the corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, *subject to these charitable trusts*. . . . The legislature . . . has given the widest powers to the trustee to administer the trusts and charities according to the intent of the testator, as declared in his will."

In *City of Philadelphia v. Girard Heirs*, 45 Pa. 1, the Court said (p. 25): "It [the Will] is a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, *in trust, as his 'primary object'*, to construct, furnish, constitute, and

maintain the institution now known as the Girard College, . . . ."

Not only did the Supreme Court of the United States as well as the Supreme Court of Pennsylvania and the lower Courts of Pennsylvania and the Legislature of Pennsylvania recognize (as above recited) that the City held Girard's residuary estate for Girard College *in its capacity as a trustee under Girard's Will*, but the City itself has recognized that the City held said estate *as trustee, and did not hold or own this property in its governmental or municipal capacity*. The City caused the Legislature in 1832 and 1847 to pass an Act authorizing it (a) to accept Girard's testamentary bequests for the improvement of the City, and (b) to carry out the charitable uses and trusts set forth in his will. This was wise because, as we have seen, the City of Philadelphia is not a sovereign, and the only powers it possesses are those granted to it by the Legislature, which, as stated by this Court in *Philadelphia v. Fox*, 64 Pa., *supra*, could be enlarged or terminated by the Legislature at will.

#### [*City Only Trustee*]

The Board of Directors of City Trusts contends that "poor white male orphans" means exactly what the testator said and should be upheld; on the other side, the City seeks to void or diametrically alter this bequest. *The City*—assuming, arguendo, that it has a standing in this case, although under the Philadelphia Home Rule Charter the Board of Directors of City Trusts is, as above noted, a separate and distinct entity which is excluded from the Charter—*has on five prior occasions demonstrated that its status and rights in the Girard Estate were only those of a trustee*. For example, in 1921 the City of Philadelphia in its governmental capacity condemned and took from the City of Philadelphia, *Trustee under the Will of Stephen Girard*, Piers Nos. 1 and 2 on North Delaware Avenue, paying therefor to the *Trustee* out of the City's general funds, \$849,672.46. On March 25, 1927, after application to and approval by the Orphans' Court of Philadelphia County, the City purchased two tracts of land at Swanson Street and Pattison Avenue, Philadelphia, for the sum of \$15,600. This sum the City paid to the Board of Directors of City Trusts, *Trustee under the Will of Stephen Girard*, out of its general funds. In

December, 1947, the City in its governmental capacity, condemned for playground purposes a tract of land in South Philadelphia which was a part of the Estate of Stephen Girard. A jury awarded to the *Trustee* the sum of \$50,000. for the property; the verdict was paid by the City out of its general funds. With the approval of the Orphans' Court of Philadelphia County, the City of Philadelphia on May 8, 1953, *purchased from the Trustee* under the Will of Stephen Girard certain tracts of land in Pike County for \$100,000., said tracts to be used as a boys' camp. Again on April 5, 1954, by decree of the Orphans' Court of Philadelphia County, the *Trustee under the Will of Stephen Girard* conveyed a tract of ground known as Girard Park, to the City to be used by the City for an open public place and park and for no other use and purpose whatsoever.

Do not those actions of the City further demonstrate that in its relationship to the Girard Estate it was acting solely as trustee and not in its governmental capacity!

How specious and fallacious is the appellants' argument that the City was acting in a governmental capacity instead of in a fiduciary trustee capacity with respect to Girard's Estate, is further obvious from the fact that *if it were acting in a governmental capacity* or if its actions were "State action", *it could legislatively change or pervert or terminate all of the purposes and objectives* minutely prescribed in Girard's Will. For example, it could legislatively provide that all poor children, instead of poor white male orphans, could be admitted to Girard College; or it could provide that only female children could be admitted to Girard College; or it could provide for co-education; or it could, we repeat, alter or pervert at will or absolutely destroy the purposes and objectives of Girard's Will and exercise complete control over the College as if it were a public institution. Appellants do not specifically so contend, but that is the logical conclusion of their contention that the City was acting in a governmental capacity.

It is as clear as crystal that until the present suit was brought, the Courts, the Legislature, and even the City of Philadelphia recognized that the City did not own or hold Girard's residuary estate (for the orphanage establishment now known as Girard College) in its governmental capacity, but either it or the Board of Directors of City Trusts owned or

held all the said property of the Girard Estate *as Trustee* for the persons, uses and purposes specifically set forth and defined and limited in and by Girard's Will.

The cases of Wilson v. Board of City Trusts, 324 Pa. 545, 188 A. 588, and Girard Estate, 73 D. & C. 42, on which appellants rely, refute, instead of support, the position of the appellants and their aforesaid contentions. What the Wilson case holds and stands for is clear from the following quotations from the opinion of this Court:

"S. Davis Wilson, as Mayor of the City of Philadelphia, and as a member of the Board of City Trusts, petitioned the Court of Common Pleas of Philadelphia County for an alternative writ of mandamus to compel the remaining Directors of the Board of City Trusts to submit their books, records, and accounts and documents relating to the management and administration of the moneys and properties in their control to three experts to be appointed by him, for the purpose of an inspection, examination and audit so that he might be enabled to properly perform his duties and functions *as a trustee* and properly protect and safeguard public interests and moneys.

"... All trusts created by wills are within the exclusive jurisdiction of the orphans' court and trusts inter vivos may fall within the jurisdiction of the two courts.

"To whom then is the Board of City Trusts accountable? The Act of June 30, 1869, P.L. 1276, provided that 'the duties, rights and powers of the City of Philadelphia, concerning all property . . . dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in . . . the city . . . shall be discharged by the said city through . . . a board composed of fifteen persons, including the mayor of said city, . . . to be called directors of city trusts, who shall exercise and discharge all the duties and powers of said city, . . . concerning any such property appropriated to charitable uses . . . to the extent that the same have been or may hereafter be, by statute law or otherwise, vested in and delegated to the said city. . . .'

"The common pleas judges, acting as a

board of appointment, designate the members of the Board and may remove them (Act of June 30, 1869, P.L. 1276, Sec. 2, and Act of May 25, 1874, P.L. 228). This power they have, however, not in the capacity of a court, but as a board of appointment. The persons named under the Act of 1869 are the representatives or agents of the City of Philadelphia *as trustee*. While the board of judges of the common pleas court appoints the trustees, the orphans' court possesses exclusive control over them in the conduct of testamentary trusts. *They are, as to the orphans' court, in the same situation as other trustees amenable to them.*

"What is the relation of this Board to the government of the municipality under the Act? As stated by Judge SHARSWOOD, in Philadelphia v. Fox, 64 Pa. 169, where the Act of 1869 first came up for consideration, it merely provided that one function of municipal government that had theretofore been exercised by the City generally, was removed and placed in a body of fifteen men, while the Mayor, Council and other officers continued to exercise all other governmental functions. Both groups are constituents of City government but they are independent of each other. Judge SHARSWOOD there said, the directors are '*a board dissociated from the general government of the city.*' It performs a part of the city's duties and as such, could be considered a part of the City government, *but its functions are apart from the general governmental powers exercised by the City itself.*

"...

"The law is clear that a trustee may compel his co-trustee to permit an examination, inspection and audit of the records of the trust estate and all matters in connection therewith that he may perform the duties with which he is intrusted and for whose exercise he is responsible."

Girard Estate, 73 D. & C., supra, is well summarized in the syllabus:

"The orphans' court will, by virtue of the authority conferred upon it by the Revised Price Act of June 7, 1917 . . . , and the Fiduciaries Act of April 18, 1949 . . . , and in application of the *cy pres* doctrine,

authorise the Board of Directors of City Trusts charged with the administration of the Stephen Girard Estate to sell a large number of homes owned by the estate in Philadelphia, even though the will prohibits the sale of Philadelphia real estate, where it appears . . . that serious deterioration will occur in the foreseeable future, . . . that their operation is presently being conducted at a loss, . . . that the proceeds of the sale would produce a substantial income and that such income is necessary in order to continue to carry out the primary purpose of testator's will, which is the operation of Girard College."

In that case Judge BOLGER said, inter alia:

"These restraints upon alienation were advanced against the validity of the will in *Philadelphia v. Heirs of Stephen Girard*, 45 Pa. 9 (1863), wherein the court held that they did not affect the validity of the trust, since they applied only to the mode of administration.<sup>12</sup> In *re Application of the City of Philadelphia*, 2 Brewster 462, the court authorized leases of coal lands for 15 years, pointing out that no tenants could be obtained for a less period, and therefore the trust purposes would be gravely endangered if the five-year limitation prevailed.<sup>13</sup> The court held that the doctrine applied, . . . It is clear to us that this is added reason why the foregoing legislation must be interpreted in the light of the cy pres doctrine, and therefore, we must find that the retention of the real estate, the subject matter of the instant petition, has become incompatible with the maintenance and development of Girard College, which is clearly the dominant purpose of the trust. . . . The various appellate decisions and the decrees of this court in dealing with the problems which have arisen in the interpretation of the will of Stephen Girard, and in the administration of the trust, are unanimous in finding that the primary object of testator was the

founding and perpetuation of the institution which we now know as Girard College."

All of the foregoing cases as well as the actions of the City itself make clear beyond the peradventure of a doubt that there is absolutely no merit in appellants' contentions that Girard College is City property owned by it in its governmental capacity, or that the City was the primary object of testator's bounty, or that the City could, in its governmental capacity or otherwise, divert the trust property to any public purpose or use it desired, or that it could rewrite testator's will in a manner and for a purpose diametrically different from the primary objects he so clearly specified.

It is, we repeat, impossible to read Girard's Will without being convinced that the primary object of his heart and soul and bounty was the construction and maintenance of an orphan establishment now known as Girard College—a home, college and orphanage for "poor white male orphans". It is a great and wonderful charitable trust which has been repeatedly sustained by the Supreme Court of the United States and by the Supreme Court of Pennsylvania and by the lower Courts of Pennsylvania for over one hundred years—it should not now be perverted or destroyed unless recent decisions of the Supreme Court clearly compel such a change.

#### RECENT DECISIONS OF THE SUPREME COURT

The final contention made by appellants is that Girard's charitable trust for "poor white male orphans" violates the Fourteenth Amendment to the Constitution of the United States and therefore can no longer be carried out. The Fourteenth Amendment (Section 1) provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The cases on which appellants mainly rely to support this contention are *Brown et al v. Board of Education*, 347 U.S. 483; *Bolling et al v. Sharpe et al.*, 347 U.S. 497; *Barrows v. Jack-*

12 & 13. These cases and others herein cited hold that permission to lease or sell land contrary to testamentary directions gives the Court no right to invalidate or pervert or destroy the clearly expressed primary object and purpose of testator's Will, viz., an orphanage establishment for "poor white male orphans."

son, 346 U.S. 249; and Shelley et al v. Kraemer et al., 334 U.S. 1. These are factually very different from the instant case and do not control it. In the Brown case and its companion case, the Bolling case, the issue was the right of colored boys to attend a public school on an integrated basis with white students. The Court held that a segregated colored school was a violation of the Fourteenth Amendment and required public schools to be on an integrated basis. In the Bolling case the same principle was applied to the Federal Government under the Fifth Amendment. In those cases the public schools were, as their name implied, public schools founded and maintained and paid for by the State or by the Federal Government or by one of their (respective) agents out of public funds, namely, taxes or other public money. Neither those decisions, nor any other decision, nor the Fourteenth Amendment provide that a private individual cannot leave his money for a church or charity of his choice, or for a private school or for an orphanage for white persons or for any sectarian purpose. Cf. Booker v. Grand Rapids Medical College, 156 Mich. 97; 10 Am. Jur. §516, p. 10; 56 C.J. §§1-3; 78 C.J.S. §§1-3; 11; 47 Am. Jur. §220.

In Pierce v. Hill Military Academy, 268 U.S. 510, the Court held that the State cannot, under its police power, deprive citizens of the right to establish private schools, or deprive parents of the right to have their children attend private schools, or compel parents to have their children attend public schools. Such a statute, the Court said, would be a violation of the Fourteenth Amendment. This was reiterated in Connell v. Kennett Township, 356 Pa. 585, A. 2d 645; Commonwealth ex rel. School District of Pittsburgh v. Bey, 166 Pa. Superior Ct. 136, 70 A. 2d 693; Commonwealth v. Beiler, 168 Pa. Superior Ct. 462, 79 A. 2d 184.

The Brown and the Bolling cases, we repeat, dealt only with public schools owned and operated with taxpayers' money and did not purport to hold that a private school for white persons or a private charity or a sectarian church was or would be a violation of the Fourteenth Amendment. They are therefore clearly distinguishable.

In Buchanan v. Warley, 245 U.S. 60, a *City Ordinance* which forbade colored persons to occupy houses as residences in blocks where the greater number of houses were occupied by white persons, was declared unconstitutional

as a violation of the Fourteenth Amendment. This is clearly distinguishable from the instant case because that was State or City action.

In Corrigan v. Buckley, 271 U.S. 323, plaintiff brought a suit in equity to enjoin the conveyance of certain real estate to a colored man in violation of an agreement between plaintiff and defendant and other landowners not to sell to any person of negro race or blood. The Supreme Court said (p. 329-330):

"Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. *This contention is entirely lacking in substance or color of merit.*<sup>14</sup> The Fifth Amendment 'is a limitation only upon the powers of the General Government,' Talton v. Mayes, 163 U.S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. Hodge v. United States, 203 U.S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment '*have reference to state action exclusively, and not to any action of private individuals.*' Virginia v. Rives, 100 U.S. 313, 318; United States v. Harris, 106 U.S. 629, 639. 'It is State action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject-matter of the Amendment.*' Civil Rights Cases, 109 U.S. 3, 11. *It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property;* and there is no color whatever for the contention that they rendered the indenture void."

The Corrigan case has been cited with approval many times by the Supreme Court of the United States. However, in the recent case of Shelley v. Kraemer, 334 U.S. 1, the Court emphasized the point that Corrigan v. Buckley,

14. Italicized throughout, ours.

271 U.S., *supra*, did not decide whether the restrictive covenants could be judicially enforced, but only whether they were valid and "since the inhibitions of the constitutional provisions invoked apply only to governmental action as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid." Again in *Hurd v. Hodge*, 334 U.S. 24, the Court emphasized that *Corrigan v. Buckley*, 271 U.S., *supra*, concerned "the validity of the restrictive agreement standing alone", while the *Shelley v. Kraemer* and *Hurd v. Hodge* cases concerned the "validity of Court enforcement of the restrictive covenants".

In *Shelley v. Kraemer*, 334 U.S., *supra*, the Court held that a colored man had a constitutional right to purchase and occupy property and that a racially restricted real estate covenant could not be enforced by the State Courts because it amounted to a denial by the State or its officers of the equal protection of the laws in violation of the Fourteenth Amendment. *The Court pointed out, however, that the constitutional provision was only a prohibition against the States and not against individual citizens.* The Court, speaking through Chief Justice VINSON, said:

"Since the decision of this Court in the Civil Rights cases, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*

"*We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment.* So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

The City in this case is not acting as a sovereign or as an agency of or for the State; if it is acting at all, it is acting, we repeat, *as trustee under a will of a private citizen.* The

property involved is the property, not of the City or the State; it is the property of the Stephen Girard Estate and it is Girard's charity and benevolence and his will, not the charity or benevolence of the City or State, that alone is involved in this case. The Courts are not acting as an agency of the City or State to deprive these applicants of any constitutional rights—the applicants are the ones who are seeking State action in their behalf to invalidate a private Will in which they are not beneficiaries. This is the converse of *Shelley v. Kraemer* and would seem to be a matter completely outside of the Fourteenth Amendment.

Private trusts for charitable purposes, of which there are a myriad, have been sustained as valid by the Supreme Court of the United States and by the Courts of every State, particularly Pennsylvania, even where the class of beneficiaries was limited to racial or religious groups. Such charitable trusts are still valid and constitutional unless State or City action (or an agency thereof) deprives persons excluded from the charity, of their constitutional rights.

#### THIS CHARITABLE TRUST WILL NOT BE PERMITTED TO FAIL MERELY BECAUSE THE CITY DOES NOT DESIRE TO OR CANNOT LEGALLY ACT AS TRUSTEE

It is hornbook law that the Orphans' Court has the inherent power to remove a trustee and to appoint a new or substitute trustee, in order to protect or preserve the trust. If the City of Philadelphia does not wish to act as trustee in this charitable estate or if for constitutional or other reasons it cannot carry out the trust for Girard College in accordance with Girard's clearly expressed purpose and his specific, as well as his dominant, testamentary intent—this would not void the trust or change it into a bequest to the City in its governmental capacity. Such a situation would merely require that a new or substitute (corporate) trustee should be appointed by the Orphans' Court, which can lawfully carry out the above mentioned trust for Girard College: *Vidal v. Girard's Executors*, 43 U.S. 127; *Girard v. Philadelphia*, 74 U.S. 1; *Bangor Park Association Case*, 370 Pa. 442, 88 A. 2d 769; *Jordan's Estate*, 329 Pa. 427, 197 A. 150; *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A. 2d 682.

## EFFECT OF CITY'S CONTENTIONS

If the present contention of the City is correct, its effect will be catastrophic on testimentary church and charitable bequests, as well as on the law of Wills in Pennsylvania. The constitutional prohibition against discrimination—the Fourteenth Amendment—is not confined to color; it prohibits the States from making any discrimination because of race, creed or color. It follows logically and necessarily that if an individual cannot constitutionally leave his money to an orphanage or to a private home and college for poor white male orphans, he cannot constitutionally leave his money to a Catholic, or Episcopal, or Baptist, or Methodist, or Lutheran or Presbyterian Church; or to a Synagogue for Orthodox Jews; or to a named Catholic Church or to a named Catholic priest for Masses for the repose of his soul, or for other religious or charitable purposes. That would shock the people of Pennsylvania and the people of the United States more than a terrible earthquake or a large atomic bomb.

We adopt what Judge LEFEVER, speaking for a unanimous six-man Orphans' Court of Philadelphia County, so well said:

"The most solemn act of a man's life, which is consummated by his death, is his last will and testament. By that act he makes a law for the disposition of his own property, acquired by his own industry, which, if it does not contradict the law of the country, has hitherto been considered inviolate. Shall it be so considered no longer in Pennsylvania?" The Supreme Court of Pennsylvania answered 'No' to this interrogatory and declared unconstitutional an Act of Assembly which attempted to vary the terms of testator's will in setting up an orphanage.

". . . Significantly, [Girard] did not specify any color limitation in the latter two gifts. Therefore, it is clear that he intended white, and no other, in the pivotal phrase now before us, viz: 'poor white male orphans', and that he knew how to say white when he meant white.

". . . There is no shortage of 'poor white male orphans'. In fact, there are more qualified applicants than can be accepted and accommodated. There is, therefore, no present failure of the purpose of the trust;

a fortiori, there is no ground for the application of the *cy pres* doctrine.

" . . . The fallacy in exceptants' position is their contention that Girard College should be regarded as a public school. It is not. Girard College is a private school. It is more than that—in Stephen Girard's own words it is an 'Orphan establishment', where the objects of testator's bounty receive not only an education but also lodging, board, clothing and all of the necessities of life. The trust estate was created solely from the private property of Girard. Girard College was not established and it has never been operated at public expense. Every dollar expended for construction, maintenance and operation of Girard College and for the education, maintenance and support of the students has come, and must come, from Girard's estate. Not one penny of the trust estate has come from the City of Philadelphia, from the Commonwealth of Pennsylvania, [or] from any other governmental body, [or] from any source other than Stephen Girard. This privately established, privately financed, and privately maintained 'Orphan establishment' cannot be equated to a publicly financed and publicly maintained school."

*[Dissenting Opinion]*

MUSMANNO, J.

Stephen Girard, the testator whose last will and testament is the subject of controversy in this lawsuit, was born in Bordeaux, France, on May 21, 1750. At the age of 14, he, like his father who was a mariner, took to the sea and made several voyages to the West Indies. When only 23, he became a duly licensed ship's captain, and sailed into many ports of the world. He first touched at American soil (San Domingo) in February, 1774, and in July of that year brought his ship for the first time to a North American continental port (New York). Then in May, 1777, he entered the waters of the Delaware and dropped anchor off Philadelphia's shores. He was never again to return to his original homeland. He rented a store on Water Street of that city and entered into business.

The shifting fates of the Revolutionary War, with the invasion and occupation of Philadelphia

by British troops, drove him from the city on occasion but he always returned to Water Street. In this neighborhood, with the exception of a voyage to Charleston and the Mediterranean, in a brig owned and commanded by himself, and which terminated in July, 1788, Stephen Girard from then on lived and died a citizen of Philadelphia which he admired and venerated with an ardor which often surpasses the devotion of native sons. During the epidemic of the yellow fever in 1793 and again in 1797-8, Stephen Girard aided the sick, comforted the dying, and made liberal contributions to the funds required in fighting the ravages of the pestilence which gripped Philadelphia in a threatening catastrophe. For his benevolent services in these trying periods of the city's history he was honored by his fellow-citizens with testimonials and public laudation.

[*Member of 'Councils'*]

In 1802 Stephen Girard was elected a member of the Philadelphia "city councils." He had now entered the banking field in which he prospered so signally that upon the expiration of the charter of the first Bank of the United States he took over the building theretofore occupied by that institution, named it the Bank of Stephen Girard, and developed it into one of the foremost financial institutions of the country.

For a period of upwards forty years, although engaged in a most extensive commerce, and the owner of numerous vessels employed in a very large foreign trade, Stephen Girard devoted most of his time to banking pursuits, varied by visits to his farm in Passyunk. As stated by Justice Read in his Opinion in the case of *Soohan v. City of Philadelphia*, 83 Pa. 9, from which most of this short biographical sketch is drawn, although Stephen Girard enjoyed a "reputation extending over the United States and Europe, as a wealthy and successful merchant and banker, his habits were so retired, plain, and frugal, that his person was unknown to many of his fellow-citizens. His fame and his name are indissolubly connected with the great charity which creates the subject of this dispute —his "orphan college." Another dispute over the "orphan college" has now, almost a century later, arisen and it is before this Court for decision.

In the year 1830, fully aware that the sands

of life were running fast and that but few grains were left him to enjoy, having now reached his 80th birthday, Stephen Girard called in his lawyer and prepared to dispose, by will, of the enormous wealth, which his innate ability and shrewd foresight, cooperating with providential circumstance, had amassed. For several weeks the testator and scrivener toiled together and by February 16, 1830, there came to light a document of 35 pages which, through litigation, commentary, and application to the works announced therein, has inspired tens of thousands of pages of writing. In this document which disposed of his riches, Stephen Girard was just and generous to relatives who would survive his death, but he stopped short of the thought that they merited the lion's share of his financial empire. An avid reader of Voltaire's writings and other philosophical works, he believed that one's own community and mankind itself deserved a place in the sunshine of the good fortune which had blessed him in the gilded days of his profitable career. Thus, he bestowed on the City of Philadelphia and its people gifts which were more reminiscent of the largesse of a rich, benevolent city father than the munificence of a private citizen. For instance, he set aside funds with which to establish a competent police force, he bequeathed money for the gargantuan task of removing wooden buildings from the limits of the city, he provided for the paving and widening of certain streets, he supplied means for cleaning and keeping clean the city's docks on the Delaware, and redistribution of the waters of the Schuylkill River within the city limits. He made available facilities to "improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it."

If anyone was entitled to be called "Mr. Philadelphia" in those days, it was Stephen Girard. In addition to the legacies above enumerated, he opened the flood of his generosity to such institutions as the Philadelphia Hospital, the Pennsylvania Institution for the Deaf and Dumb, the Orphan Asylum of Philadelphia, and various other organizations for relief of the poor and the distressed.

Grateful to the city which had made him rich, Girard was not unmindful of the opportunities afforded by a State government which allowed amplitude to the unfoldment of his business

genius. Thus he bequeathed \$300,000 to the Commonwealth of Pennsylvania for purposes of internal improvement by canal investigation.

While all these bequests evinced a warm disposition toward physically improving his city, bettering the general welfare of the people, and mitigating the hardships of the unfortunate, proving the truth of his statement that he had "sincerely at heart the welfare of the city of Philadelphia,"—what was even closer to his heart was the desire to aid in "educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed." Towards the accomplishment of this desire he set aside \$2,000,000 to provide "for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds."

In Clause XX of his will he stated:

"Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate . . unto 'The Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned."

In Clause XXI he provided:

"And so far as regards the residue of my personal estate, in trust as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting—"

and maintaining the collect which he described in the minutest of detail as to construction, architecture, furnishing, the employment of instructors, the feeding and the clothing of students. As a man of the sea, he could not, with more particularity, have prepared for the construction, maintenance, care, and navigation of a ship, than he directed as to what was to be done to launch his college for orphans. However, before the keel of this vessel of education could be laid, he required that the State do certain things—many things.

Stephen Girard was obviously aware that the enormous project of building a college, selecting and maintaining its students, hiring and

paying for instructors, and increasing its capacity, *always on a non-paying student basis*, was one which called for the intervention of the State. However, as appreciative as he was of what the State and City had offered him in the way of opportunity, he was pragmatic enough to realize that even philanthropy calls for rigid organization and supervision. It also in some ways requires sanctions. The fond father who gives his child pennies if he will eat spinach is applying a principle which reflects human nature in even lofty and exalted enterprises. It will be recalled that Mr. Girard bequeathed \$300,000 to the Commonwealth. This legacy was conditioned upon the Commonwealth's enactment of the legislation necessary to permit Philadelphia to perform the cleaning, building, paving and other operations he had outlined. Stephen Girard also provided that if the City of Philadelphia did not carry out his wishes with regard to the Girard College, the residue of his estate (the \$2,000,000 and accumulations) would go to the Commonwealth of Pennsylvania for internal navigation; and if the Commonwealth of Pennsylvania failed to "apply this or the preceding bequest to the purposes before mentioned," the money in that event would pass to the United States for the purposes of internal navigation.

It is difficult to imagine a testamentary disposition more completely interwoven with the public's welfare and responsibilities than the Girard will, all of which renders quite extraordinary the decision of this Court to the effect that the Girard College is simply a private institution. But that will be taken up later. Proceeding with our narrative of events, we arrive at the death of Stephen Girard on December 26, 1831, and the probating of his will on December 31, 1831.

#### [Action of State]

Stephen Girard's will, as we have seen, envisioned a beautiful dream—a college for the education of the poor. But this dream would have died a-borning without State action. The General Assembly of the Commonwealth of Pennsylvania was required to act, and act within a year's time, if Philadelphia was to see one brick placed on top of another in the erection of Stephen Girard's temple of learning for poor children. The General Assembly lost no time in acting. On March 24, 1832, it passed an Act

directing the constituted authorities of Philadelphia to carry into effect the will of Stephen Girard.

Less than a month later (on April 4, 1832) the General Assembly passed another Act providing that—

"the select and common council of the City of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the last Stephen Girard."

Further State intervention was required before doors could be hung in the portals of Girard College. The Girard will stipulated that no orphan could be admitted unless some authoritative relative or "competent authority" guaranteed that the orphan would not be withdrawn from the school before termination of his studies. The Legislature, accordingly, on February 27, 1847, passed a Special Act making the City a guardian of every Girard College orphan and prohibiting interference from any relative. Paragraph 9 of Clause XXI of the Girard will provided that when the orphan students arrived at the age between 14 and 18 they were to be bound out by the City to suitable occupations until they had attained the age of 21. The Act of February 27, 1847, authorized the City to bind out the orphans until they reached their majority.

#### [Fourth Act ]

A fourth Act was passed by the General Assembly on April 30, 1953, meeting another requirement of the Girard will, namely, that the City be allowed to bind Girard College orphans as apprentices.

So much was the Girard will a matter of public business that at Harrisburg a special committee was chosen and entitled: Select Committee of the Pennsylvania House of Representatives on the Estate of Stephen Girard. While the General Assembly was enacting legislation implementing the Girard will and supplying the legal equipment required to put the provisions of the will into effect, the City Councils of Philadelphia (Common and Select) were engaged in preparing for the erection of the college buildings. On March 21, 1833, the Philadelphia Council passed an ordinance pro-

viding for the construction of the school, entitling it the Girard College for Orphans, all building plans to be approved by Council. On July 14, 1836, an ordinance was adopted making provision for the purchase of books and paraphernalia. On January 28, 1841, the Council ordered that contracts entered into by the College had to be validated by Council. The Council appointed committees to handle the innumerable details connected with maintaining, creating, and running a college.

#### [Building of College]

The cornerstone of the institution was laid on July 4, 1832, and it was officially opened for student occupation on January 1, 1848. On November 9, 1848, Council appointed a visitation committee to visit the college once a month and report on its findings to Council. That the Girard College was an object of continuous solicitude, care, and managership on the part of the City fathers is evidenced by the fact that between September 15, 1832 and December 18, 1869, the Council enacted 48 different ordinances devoted exclusively to the Girard College.

In 1869 the management and direction of Girard College was placed in the hands of a Board of Directors of City Trustees, created by the General Assembly (Act of June 30, 1869, P.L. 1276). This Board (hereinafter called the Board of City Trustees) was composed of the Mayor, the presidents of the Select and Common Councils, and 12 other citizens to be appointed by the Court of Common Pleas of Philadelphia County. That Board is the governing body of Girard College today, administers the trust in all its ramifying particulars and selects the student body. The Treasurer of the City of Philadelphia serves as the Treasurer of the Board. Through this Board and through periodical examinations, visits, and audits the General Assembly maintains a direct supervision over the College and its activities. The Board is required to report annually to the City Council, to the State Legislature, and to the Court of Common Pleas, publishing its reports in the Philadelphia newspapers. The City Controller is required to audit the accounts. The Act makes the members of the Board city officers.

We have related how Stephen Girard declared in his will that the student body of

Girard College was to be made up of "poor white male orphans." On February 1, 1954, William Ashe Foust and Robert Felder, two Negro fatherless boys, aged 8 and 7 years respectively, applied for admission to the Girard College, but were refused enrollment by the Board of City Trusts. In refusing the admission, the Board stated that it had been "advised by its Solicitor that it has no power to admit other than white boys to Girard College."

On September 24, 1954, the rejected Negro applicants and the City of Philadelphia, acting through the Mayor and the Commission on Human Relations, filed separate petitions in the Orphans Court of Philadelphia County for a citation upon the Board to show cause why the applicants should not be admitted. The Board admitted in its Answer that the applicants had been denied admission solely on the basis of race. After hearing, the Court below upheld the action of the Board and the applicants appealed to this Court. Since the Commonwealth of Pennsylvania was named the remainderman under the will of Stephen Girard, the Attorney General of the Commonwealth intervened to protect its rights as remainderman as well as its rights as *parens patriae* to supervise and enforce the provisions of a charitable trust. The Commonwealth upholds the position of the applicants that the Girard trust is a public charitable trust and as such is controlled by the Fourteenth Amendment. The City of Philadelphia, through the City Solicitor's office, takes the same position.

At the oral argument before this Court the Commonwealth, the City, the applicants, and the Board of Directors were all represented by able counsel who also filed informative briefs. The Court took the case under advisement and the Majority has now affirmed the decision of the lower Court. In its Opinion the Majority well stated the issue brought before us for decision:

"The question then, is whether the limitation in Girard's will to white children as the beneficiaries of his college or orphanage, although undoubtedly lawful at the time of the execution of his will and of his death, has become invalid as a result of the adoption of the Fourteenth Amendment which prohibited any State from denying to any person within its jurisdiction the equal protection of the laws. No such question

could possibly arise in the case of a private charitable trust for the Fourteenth Amendment applies only to agencies of the State or of a municipality within the State; it is directed solely against State, not individual, action."

#### [Question of State Action]

Is then the action of the Board of City Trusts an action of the State? The Supreme Court of the United States said in the case of *Ex Parte Virginia*, 100 U.S. 339, 347, that when one "acts in the name of and for the State, and is clothed with the State's power, his act is that of the State." How can there be any doubt that the State of Pennsylvania speaks in the administration of the Girard trust? We have seen the State passing five different statutes devoted to the Girard trust. We have witnessed the State setting up the machinery for running the Girard College. We have noted that the House of Representatives formed a special committee to consider the Girard estate. And it must particularly be observed and emphasized that the State's concern for the Girard trust is not a matter of past tense. It *today* expresses a direct supervision over the administration of Girard College. Members of the Legislature visit it officially. The City of Philadelphia is required to submit periodical reports on the College to the Legislature. The accounts of the College are open to the State's inspection.

It is a matter of no little weight in determining whether the Girard trust is a public or private charity to note that the City itself makes no effort to conceal the governmental character of its involvement in the direct management of the College. The rejection by the Board of City Trusts of the applications of Felder and Foust was written on official stationery of the City bearing in large type the words CITY OF PHILADELPHIA.

How can it be doubted that in creating the Board of City Trusts the General Assembly intended to bring into being a governmental agency? The enabling Act provided that all duties, rights and powers of the City of Philadelphia with respect to property dedicated to charitable uses or trusts are to be discharged by the City "through the instrumentality of a Board composed of fifteen persons including *the mayor of said city, the presidents*," etc., "who shall exercise and discharge *all the duties and powers*

of said city . . ." The Board is directed "in the name of the . . City . . to make all necessary arrangements, and for and in the name of the said City to do, perform and discharge," all necessary acts in the discharge of the trust. And then, as if to eliminate the possibility of questions in the future as to the authority of the Board, the Act specifically declares that "the said directors, in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents or officers of said city . .".\*

The State could have refused to accept, had it chosen to do so, the largesse of Stephen Girard, but it did not so refuse. On the contrary, it eagerly and enthusiastically accepted every proposition advanced by Mr. Girard in his will. The testator spelled it out clearly that if the State was to receive the \$300,000 he bequeathed to it, it had to enact certain enabling laws. By accepting the legacy and by passing the requested legislation the State has entered into a contractual obligation which it cannot ignore.

[*Not a Private Institution*]

The Majority of the Court seems to have difficulty in finding that the Girard College is a public institution. The job, as I see it, is not how to find that the Girard College is a public charity, but to ascertain by what processes of search, reasoning, and logic it is possible to declare it is a private charity. With the exception of the fact that Stephen Girard originally supplied the funds for the founding of the institution there is not one item in the whole 125-year history of Girard College to support the contention that it is a private institution. The \$2,000,000 originally bequeathed for the college was exhausted with the final construction of the buildings. Had it not been for the able management of the city of Philadelphia and the guiding hand of the State of Pennsylvania the Girard College would most likely have remained a group of empty buildings unenlivened by the shouts of happy children within. Because of the pains taken, the time spent, and the wisdom exercised by the City of Philadelphia acting through its designated officials, the Girard estate, after a perilous escape from a near-foundering, has sailed on to fortune, having now an appraised value of \$98,000,000.

\* Italic throughout, mine.

Its real property alone is worth over \$10,000,000. And it must not be overlooked in this connection that the Girard estate did not have to pay commissions on income and capital gains, which it most assuredly would have had to do if the trustees had been private trustees instead of governmental agencies.

Stephen Girard planned well. He knew that without the power, the authority, and the ceaseless supervision of the State, it would have been impossible to crystallize into reality his cherished hopes for a college for non-paying poor children. If, by some dreadful retroactive cataclysm, there would fall out of present reality, all the governmental authority, direction, control, and guardianship which have gone into the Girard College for the last 125 years, the college would today be but a withered dream hanging disconsolately on the melancholy vine of unrealized hopes.

The only question in this case is whether the Girard College is a public institution. If it is, it cannot avoid the Fourteenth Amendment and it must therefore admit the applicants in this case. Instead of considering this issue, which the Majority itself has pointed out, the Majority goes on to discuss at great length a matter that is not in dispute at all, namely, that a testator has the right to leave his property to whomsoever he wishes. Certainly a testator is entitled to choose the beneficiaries of his bounty, but if he asks the government to administer his estate he cannot expect the government to ignore the very law it symbolizes. Parents who consent to have their child adopted by others cannot complain if the adopting parents, raising him in another state, follow the law of that State instead of the law of the State in which he was born. If a testator should today leave his property in trust to the State for the training of destructive atom bomb engineers, and then later on the destructive atom bomb should be proscribed, the government could not be compelled to go on instructing students in a sphere of education beyond the pale of the law.

In 1870, this Court had before it for consideration the Act of June 30, 1869, P.L. 1276, which created the Board of Directors of City Trusts. Referring to that case the Majority Opinion says:

"The Act was upheld as to its validity in *Philadelphia v. Fox*, 64 Pa. 169, where the

policy it represented was described (p. 183) as 'having such a board dissociated from the general government of the city.'

But the Majority only released part of the quotation. The whole passage reads as follows:

"We have nothing to do with the wisdom of measure—with the policy of having such a board dissociated from the general government of the city, or with the mode of its selection. Those are questions exclusively for the legislature. No one I think can doubt that it was entirely competent for that authority to vest the entire management and control of all municipal affairs in just such a body as that constituted. If they could do the greater, they can do the less. They could make a similar provision for any other department of the municipality. They might establish a board of police, of highways, of sewerage, of cleansing."

It will be seen that in the Fox case the Court equated the Board of City Trusts with a municipal board of police or a board of highways. How can one fail to see that when the Court there spoke of a board "dissociated from the general government," it meant something dissociated from sovereign authority? If it had meant what the Majority here wants to try to have it mean, the Court would never have included a board of police as an illustration because a board of police is certainly part of the municipal government.

The Majority picked up from the Fox case a mere fragment and then dropped it. If it had lingered a little longer in discussion with that epochal decision, it might have concluded that in reality it is decisive of the question before us. For instance, Justice Sharswood, who wrote the decision, said:

"Such a municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but *only* as it seems for *public purposes, germane to its objects*. . . . I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. . . . But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality."

If this Court follows the Fox case, and it is

bound to do so since the Majority cites it favorably, it cannot possibly declare the Board of City Trusts to be engaged in administering a private trust. A municipal corporation, as Justice Sharswood stressed, may only be a trustee where the grant has to do with a *public purpose*, germane to the object of the corporation. Justice Sharswood said further:

"When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere *creature of the state, an agent acting under a revocable power*. . . . It is surely not competent for a mere municipal corporation, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the state from changing it as the public interests may require."

It is obvious from the above that the City of Philadelphia, as a branch of the State government, cannot entertain a right which would prevent the State from changing it as public interests may require, for instance, as the Fourteenth Amendment requires.

Counsel for the applicants put it very well in their brief when they say:

"If Girard had been able to set up and maintain Girard College in the manner described in his Will without any special state and municipal legislation, and without the use of public officials, we might be dealing with the situation envisioned by the Orphans' Court, to wit: purely private arrangements enforced and observed without any State action. But this was not the case."

Indeed it was not the case. As already pointed out, in effectuating the objectives of his will, Stephen Girard called on the Legislature of Pennsylvania, the City Council of Philadelphia, the Mayor of Philadelphia, and the Treasurer of Philadelphia. Then the General Assembly of the Commonwealth added for his benefit the services of the judges of the Courts of Common Pleas (now 21) in appointing the Board of City Trusts administering his estate. If such a plethora of governmental activity does not make Girard's trust a public trust, then the word "public" has undergone a mysterious transfor-

mation which is not recorded in the dictionaries of the English language or the lexicon of the law.

Counsel for the Board of City Trusts in their brief tell how the \$2,000,000 set aside for the erection of the college was not sufficient for the purpose because of a great depreciation in the value of some of the investments due to the financial panic of 1837. After this statement, counsel go on to make this significant declaration:

"Not only was there a depreciation in the value of some of the investments, and consequently insufficient revenue for the completion of the buildings of the college (*Soohan v. City*, 33 Pa. 23,) but the Councils used incomes from the Girard Estate for *municipal purposes other than the College*, amounting to \$571,958.42, in the years 1833 to 1848 inclusive."

Is it necessary to expatiate on that disclosure? "Councils used incomes from the Girard Estate for municipal purposes"? Can anything be more public than municipal purposes? Incidentally these revealing statistics are drawn from the Report by Hon. George Wharton Pepper, Auditor.

#### [Board's Connection with City]

The Majority attempts to draw a distinction between the City of Philadelphia and the Board of City Trusts, in spite of the fact that the Board of City Trusts has in the very heart of its organization the chief executive officer of the city, the Mayor; and its chief financial officer, the Treasurer. In support of its strange conclusion the Majority says that the fact the Board filed an Answer to the City's petition is evidence of "the complete severance between the city in its ordinary municipal or governmental capacity and the Board of Directors of City Trusts administering the trusts confided to the city as trustee." But the action of the Board in this respect is merely self-serving. It is not the first time in the history of government that a subsidiary body presumes to question the authority of its parent body.

If the bland affirmation of the Board makes the Board something removed from the City, then the whole present litigation is moot, and this Court is engaged in static academic philosophizing. But it is not enough for the Board

to say that it forms no part of the City. This is something it must prove and I submit it can no more prove such severance than the tentacle of any invertebrate can, by mere assertion, make itself independent of the body from which it draws life. While not of any great importance, it is a matter of human interest at least to point out that the attorneys for the Board, in a moment of factual realism, detached from the part they are enacting in this litigation, referred to themselves as "Attorneys for the City of Philadelphia." On the cover of their brief they sign themselves: "*Attorneys for the City of Philadelphia, Trustee under the Will of Stephen Girard Deceased, Acting by the Board of Directors of City Trusts.*"

In their brief the Board attorneys concede that the Board is a governmental agency but maintain it does not act as a governmental body. But if it is a creature of the law, which it is, it must respond to the law, and, acting according to the law, it cannot possibly ignore the provisions of the Fourteenth Amendment.

The Board's attorneys state further in their brief:

"No one doubts that the Board is an agent of the City, but the City and the Board together are agents of Stephen Girard to carry out the terms of the will."

But can the City be the agent of a private individual? The City may no more be an agent of a deceased citizen than it can do the bidding of a living private person. Our whole democratic form of government is founded on the proposition that public officials have but one master and that is the public.

In contending for their position the attorneys for the Board argue that it is not the State or the City which offers educational facilities of Girard College to anyone, but that it is Stephen Girard who does so on his own terms. And then the writer of the Board's brief enunciates in epigram and in italics: "*Since the State offers nothing to anyone, it can scarcely be said to deny something to someone.*" But one could reply with an equal economy of language to this apothegm by saying that: In the exercise of its sovereign powers the State offers all opportunities to everybody, and when it denies anything to anybody it denies something to everybody.

The Majority Opinion makes reference to the Philadelphia City Charter and seems to

find therein support for its thesis by declaring that the Charter says it does not apply to the Board of City Trusts. However, it seems to me that this exclusion does not mean that the Board is any less governmental. On the contrary, it could mean just the reverse because the Board, being a distinct creature of the Legislature, is under the control of the Legislature and must, as we have seen, report to the Legislature as well as to the City.

In the case of Girard's Appeal, 4 Packer 347, 361, this Court specifically stated that "the directors of city trusts are a department of the municipality which the Legislature had a constitutional right to establish." This Court said further in that case: "A man who constitutes such a municipality his trustees, does so subject to all the changes which the sovereign power may make in its character and organization." Thus, it is futile to reason that the Board of City Trusts has no power to do anything which seems to be in opposition to the testator's words. The Board, being a child of the Legislature, is a public agency and, regardless of apparent prohibition in the provisions of the trust document it is carrying out, cannot avoid enforcing the law of the State which is its master.

The Majority introduces the statement that the City is administering some 89 charitable trusts at this time. I do not know what are the provisions of these trusts, nor do I think the Majority knows either. In any event it is entirely irrelevant to speak of these other 88 trusts, for it is safe to assume that not one of them is so interlocked with the State and City as is the Girard trust. And it is not unfair to assume, since the matter has not been called to our attention, that none of those trusts contains provisions in opposition to the Fourteenth Amendment.

#### [Appointment of Other Trustees]

The Majority advances the idea that if the Board of City Trusts is engaged in "State action", the petitioners would still not be entitled to the remedy they seek because the Orphans Court could appoint another trustee. The Girard will provides in Article XXIV that if the City wilfully and knowingly violates any of the conditions in the will, the remainder and accumulations will go to the Commonwealth of Pennsylvania. The Majority seems to be of

the impression that the college could go on operating just the same even if it were deprived of these enormous resources because it would always have the income from the real estate. But there is no evidence whatsoever that with the City withdrawn from the administration and the remainder and accumulations paid over the Commonwealth, the Girard College could continue with the large student body it now accommodates, if indeed it could live at all. The Majority feels that it could, and says that on this point the testator "speaks from the grave." Being dead since 1831, I would think that on all points the testator speaks from the grave,—and that on all points it is clear that Stephen Girard's primary objective was to dedicate his entire estate to the public in one form or another. In paragraph 9 of Article XXI, he said:

"In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia will observe and evince especial care and anxiety in selecting members for their City Councils and other agents."

The polar star of Stephen Girard's entire testamentary disposition was the welfare of Philadelphia. He specifically provided for municipal improvements, assistance to charitable institutions, and education for children, all objects of governmental concern.

The lower Court, in affirming the rejection by the Board of City Trusts, emphasizes that Stephen Girard made it very clear that the students for Girard College were to be limited to "poor white male orphans," and that since the language was very specific, there was therefore no need of interpretation or construction. The Court highly praised the unequivocality of Girard's language:

"Among the outstanding characteristics of this will is the meticulous use of plain, unequivocal and unambiguous language. A reading of the will, from its beginning to end, leaves no doubt that Girard knew exactly what he intended, and expressed his many intentions with clarity and simplicity."

Because of this clarity and simplicity the Court resolved that no canons of construction are to be used, that the words in Girard's will mean what they say and nothing else, and must therefore not be altered to mean something else. The fact, however, remains that various words and phrases in Girard's will have been interpreted to conclude something different from their literal purport. In all verity, in at least one instance the interpretation was made to mean exactly the antithesis of the plain declaration of the language. Stephen Girard specifically announced in Article XX of his will:

"So far as regards my real estate in Pennsylvania, in trust, that *no part thereof* shall ever be sold or alienated."

But real estate belonging to the Girard estate has been sold. The Majority Opinion here, in affirming the lower Court's Opinion, seeks to explain this diametrical defiance of Mr. Girard's specific request by saying:

"It is true that there were some sales made under the authority of the Orphans' Court but only because the income of the trust had shrunk to a point where the college could not be efficiently maintained and therefore the sales were the only recourse open in order to preserve the purposes of the trust; this was purely an administrative matter, sanctioned by law."

This may explain away for the Majority the alteration in the will, but it cannot be denied that the will was made to say something which Mr. Girard did not say.

Stephen Girard also declared that the terms of leases of his real estate were not to exceed 5 years. Despite this precise limitation of 5 years, the Board of City Trusts has, under the authority of the Court, executed leases for 15 years. The Majority also excuses this change with the remark that it was impossible "to secure good tenants on shorter term leases." But it cannot be gainsaid that liberties were taken with the plan, unequivocal, and unambiguous language of Stephen Girard.

It is strange that the Majority makes no reference to the most drastic change of all in Girard's will. If anything was made clear in the Girard will it was that he was creating a trust estate for the benefit of orphans. The question has arisen as to whether the term "orphan" should mean orphans regardless of

race, but there can be no question that the beneficiaries had to be *orphans*, that is, children who have lost both father and mother. We know, however, that the Board of City Trusts admits to Girard College fatherless children who have living mothers.

Webster's Unabridged International Dictionary defines an orphan as:

"A child bereaved by death of both father and mother, or less commonly of either parent—in the latter case sometimes called half-orphan."

But the Girard will did not speak of half-orphans. It spoke of orphans. In any event, if the word orphan is intended to include fatherless children, why does it not also embrace motherless children? Are children of 6 to 10 years in less need of a mother than a father? I believe that this Court in the case of Soohan v. City of Philadelphia, 33 Pa. 9, was entirely justified in including fatherless children under the term *orphan* because it was interpreting the spirit of the Girard will which was directed toward taking care of children who were poor and in need of attention and care.

#### [*"Orphan" Change Questioned*]

But if the word *orphan*, for reasons of benevolence and humanity, was to be enlarged to encompass children who have lost their father but not their mother, why did the interpretation not include those children who have lost a mother but still have their father? Charity should not strain at mere words nor walk on the stilts of syntax. Stephen Girard's primary objective was to befriend poor children without adequate parental care. Since this Court allowed Girard's meaning to break through the imprisoning syllabic walls of *orphan*, why did it then limit the freed meaning to fatherless children?

The Majority, quoting from the case of Franklin's Administratrix v. City of Philadelphia, 2 dist. Rep. 435, said that despite various "on-slaughts" on the Girard will, the Girard charity was left "fixed, firm and immovable as a rock." It has been shown, however, that the granitic stability of the will did not prevent a softening of its provisions to allow the sale of real estate, it did not hamper the augmenting from 5 to 15 years of leases, it did not interfere with the humanitarian enlargement of the term *orphan*.

to include children with a mother living. Why must it then remain implacable in the presence of the Fourteenth Amendment to the Constitution of the United States?

[*Perpetual Trustees*]

The Majority indicates that Girard's purpose in deeding his estate over to the City of Philadelphia as a perpetual trustee was due to the fact that there were no trust companies in existence at the time with facilities for perpetual administration. In this respect the Majority writes: "James G. Smith, in his book on 'Trust Companies in the United States,' speaks (p. 233) of the age-long 'search for a continuous trustee.'" But this does not say that the search was unsuccessful. There was an age-long search for a route to India also, but it was finally successful.

The full sentence, from which the Majority quotes five words, reads:

"Another interesting example of this search for a continuous trustee is the board of trustees in charge of the Delaware General Loan Offices which were first established in 1759."

Seventy-one years were to pass, after 1759, before Stephen Girard sat down to compose his long will. In the meantime a continuous trustee was not the far-away Indian pearl suggested by the Majority. An advertisement in the New York Evening Post, August 6, 1822, of a corporation seeking trust business, (and quoted in the same book cited by the Majority, p. 247,) proclaimed:

"The public will readily perceive, that the advantages of this company to *protect property* for the benefit of *infants or others*, are far greater than those of individual executors or other trustees, who are always liable to casualties . . . By placing such property in the charge of this company, *who have continued succession*, there can be no danger whatever of any such casualties." (Italics in original advertisement)

In seeking to interpret Stephen Girard's intent in the matter just discussed, the Majority says: "If speculation were to be indulged in—" But why indulge in speculation when the 35-paged will of the testator demonstrates on almost every page that Girard wished the

Government to handle his estate because he was making the public his beneficiary and he particularly wished the government to stand behind his college? He desired a government trustee because he knew that government activities are more exposed to public scrutiny than private enterprises and that, under the spotlight of public attention, there would be less chance for corruption, inertia, and mismanagement to worm their way into the trust estate and eat out its substance. Girard was so determined that the whole project be governmental that he directed that if the City of Philadelphia failed to carry out his instructions, the Commonwealth of Pennsylvania would become the successor in title, and if the Commonwealth was also indifferent to its obligations under the will, the estate would then become the property of the United States of America. What more could a person do to demonstrate the undeviating public character of the trust?

[*Girard's Prejudice*]

The Majority Opinion quotes over and over the line which is slightly revolting to me that a man's prejudices are part of his liberty. From a philosophical point of view I would say that a prejudiced person may have the right to hurt himself through the indulgence of his prejudices, but he has no right to affect the liberty of others. But be that as it may, no testator has the right to ask the government to do something which is prohibited by the Constitution. All this, however, is beside the point. There is no evidence that in writing his will, Stephen Girard was motivated by prejudice. In 1830 the Federal Constitution sanctioned slavery.

As evidence of Mr. Girard's lack of prejudice it is to be noted that although he forbade clergymen to enter the college he did not prohibit religious instruction in the college. Justice Story in the famous case of *Vidal v. Philadelphia*, 43 U.S. 127, spoke to this subject as follows:

"The Testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the College. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation, in the College—its general precepts expounded, its evidences explained,

and its glorious principles of morality inculcated?"

In fact, Stephen Girard specifically declared in his will:

"My desire is, that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, *adopting at the same time such religious tenets as their matured reason may enable them to prefer.*"

Supporting the decision of the Board of Directors of City Trusts which excluded the applicants, the Majority argues:

"Stephen Girard naturally must have realized that he could not create an institution large enough to furnish both sustenance and education to any and all the children of Philadelphia, Pennsylvania, New York and New Orleans who might desire to be admitted; he could provide for only a small minority of such children and accordingly he prescribed a method of selection as he had both a legal and moral right to do unless there were involved a violation of some affirmative provision of law."

But this is an argument which crumbles at the slightest touch of logic. It cannot seriously be maintained that Stephen Girard himself could build a college large enough to house all the poor white orphan boys in Philadelphia, New York, and New Orleans. Even if he limited himself to the numbers suggested by the Majority, there would still be left countless numbers of boys that could not enjoy his limited fortune. Stephen Girard's restriction, therefore, was not based on the proposition of accommodating numbers of children to quantity of dollars. The limitation indicated was merely an expression of Mr. Girard's determination to help as many as he could on the thoroughfare of life, just as one might build a fountain along the road to refresh such travellers who came that way, without intending that the whole world should bend its steps toward that particular highway in order to obtain a draught of water.

The Majority Opinion quotes from the case

of *Rice v. Sioux City Cemetery*, 349 U.S. 70, 72, that: "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection he invoked." But it is specifically a State deprivation which is involved here. In administering the Girard trust, the Board of City Trusts is acting for the City of Philadelphia which is a branch of the State; and, by failing to invoke the Fourteenth Amendment, it is guilty of a State deprivation.

The Majority declares that "it is perfectly clear, therefore, that private trusts for charitable purposes, not being subject to or controlled by 'State Action,' are wholly beyond the orbit of the Fourteenth Amendment." But this assumes what the Majority has not established, what the lower Court has not established, and what the Board of City Trusts has not established, namely, that the Girard trust is a private trust for charitable purposes. On the contrary, it is impossible to conjure up a more obvious public trust than this one. It was baptized by the State, it was confirmed by the State, the State guided it by the hand in its infancy, and the State stands beside it today in direction, counsel, management, and supervision.

The Majority reasons further that:

"Such trusts [private charitable trusts] abound in overwhelming numbers and there can be no question as to their legality however limited be the class of their beneficiaries or whatever be the nature or basis of their restrictions; charitable trusts for limited groups, whether racial or religious, are as valid as if for all the people of the world."

But here the Majority shoots wide of the target. We are speaking here, not of private charitable trusts; we are speaking of public charitable trusts *administered by the government!* In every reference to the Girard charity trust, there must be added in assumed parentheses the limitation: Charitable Trust administered, controlled and directed by the State, which of course, makes the trust something quite different from the charity which the Majority is defending, but which needs no defense because it is not being attacked by anyone.

The Majority says that:

"We have charitable trusts for ministers of various church denominations, for

foreign missions, for churches, priests, Catholics, Protestants, Jews, whites, negroes, for relief of the Indians, for widows or orphan children of Masons or other fraternities, for sectarian old folks homes, orphans, and so on."

But in the illustrations given the government does not administer, the government does not audit, the government does not direct, the government does not control—as it does in the Girard charitable trust. The Majority Opinion defends, defends, and defends a cathedral in the wilderness near which, in the whole century-old litigation over the Girard estate, not a hostile arrow has fallen. Certainly there can be a charitable trust for Indians, but to say that such a trust administered by the government may legally and constitutionally deny Indians any of the provisions of the Bill of Rights or of the Fourteenth Amendment is to pose what everyone knows to be insupportable.

The Majority adds:

"It is true that Girard appointed the City of Philadelphia as the trustee to administer the trust according to the terms of his will, but he certainly did not intend thereby to empower it to conduct such administration in *public or governmental capacity*, or to bring into play any of its *proprietary* rights since it is merely the title holder of Girard's property and not its beneficial owner." (Italics in original).

But how else can a City act except in its public or governmental capacity? A City is not like an individual citizen. It is the composite of all the citizens: it speaks and acts for everyone within its boundaries. The Majority says that the City is not the beneficial owner of the trust estate. It is indeed a beneficial owner. It is accepting the benefits of an obligation which otherwise it would have to discharge, namely, educating the children who are actually in Girard College.

The Majority asserts that the City is acting only as a fiduciary, but what is meant by acting as a fiduciary? The City does not have a fiduciary existence. It has only a municipal existence. The fact that it owns and operates a golf course does not make it a country club; the fact that it stages open air light opera does not make it an entertainment entrepreneur; the fact that it owns and operates swimming pools does not

make it a recreation park promoter. There is not a private school in the whole State of Pennsylvania which is controlled and managed by a City or any municipality as is the Girard College.

#### [Not a Private School]

The Majority declares itself unable to perceive any difference between the legal principles which apply to Girard College which "is a comparatively large institution," and those which govern "the smallest of private schools." The difference, however, is one which requires no microscope to detect. The Girard College has a board of directors made up of the Mayor of Philadelphia, the President of City Council, and twelve members appointed by the Courts of Common Pleas. This Board thus represents the body politic, the public, the citizenry of the County of Philadelphia, a sovereign subdivision of the sovereign State. Since our judges are elected by the people, as are the Mayor and President of City Council, the Board of City Trusts is therefore an expression of the people themselves. The private school, on the other hand, is strictly a private commercial enterprise run for profit. The legal principles which control Girard College are separated by a chasm as wide as the constitution itself from a private school owned by private individuals, and run by private individuals, all for the monetary advantage of private individuals. Private schools receive no tax exemption. For that reason alone the legal principles which guide their destiny are quite different from those which apply to Girard College which enjoys a tax exemption annually of \$550,700. (Orgontz School Tax Exemption Case, 361 Pa. 234.) No private school in the State can boast the governmental direction, control, and privileges which are as much a part of Girard College as the buildings themselves.

The Majority makes the statement that the Girard College "has been supported and maintained for now over a century by Girard's estate; not a penny of State or City money has ever gone into it." The obvious answer to that observation is that the State and the City have spent "not a penny" but countless tens of thousands of dollars in making Girard College the institution it is today. Who can calculate the cost to the State of the printing, clerk hire, and secretarial service which went into the

actions of the General Assembly in holding hearings, conducting investigations, drafting bills and enacting them into law? Who knows how much it cost the City of Philadelphia for the hearings on and the printing of the 48 ordinances passed by the Council of Philadelphia in organizing and directing the establishment of Girard College? Who knows how much it cost for all the special visitations, for the audits, for the inspections and examinations conducted by the State of Pennsylvania and the City of Philadelphia in behalf of Girard College? Who knows what it cost the City to work out the investments which have increased the capital of Girard College from near extinction to \$98,000,000?

The Majority reminds us that:

"It must also be remembered that the City in its own right was a second beneficiary of part of Girard's residuary estate, so that it had an independent interest of its own to protect, wholly apart from its status as fiduciary."

But the fact that the City had an independent interest of its own to protect proves all the more the *public* nature of the City's interest in the Girard estate; and that is the only question before us in this appeal, namely, is Girard College a public institution or a private charity?

The theory advanced by the appellees that if the decision of the lower Court is reversed,

testators in the future will not be permitted to leave their property to whomsoever they wish is sheer chimera. The freedom of *jus disponendi* will never be curtailed in America; it is part of our American liberties. What the Commonwealth, the City, and the appellants contend, and properly so, is that if a testator, for benefits which accrue to his estate and to the accomplishment of his desires, wills his property to the government in trust, he may not ask the government to do anything which is contrary to the objectives of the government.

The whole history of Stephen Girard's life and the wording of his will demonstrate that he never intended, desired, or wished that the government should administer his trust in any way which would run counter to the intentment of the Constitution. In fact among his last words appeared the following:

"And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars."

The phrase "happy constitutions" undoubtedly refers to the Constitution of Pennsylvania and the Constitution of the United States. Adherence to those Constitutions requires the reversal of the decision of the Court below.

## GOVERNMENTAL FACILITIES Public Housing—Alabama

Rosa WATTS et al. v. HOUSING AUTHORITY OF THE BIRMINGHAM DISTRICT et al.

United States District Court, Northern District, Alabama, November 30, 1956, Civ. No. 7690.

**SUMMARY:** Property owners and tenants of dwelling houses being razed to build public housing projects in Birmingham, Alabama, all Negroes, brought a class action in federal district court against the Housing Authority. All the plaintiffs sought by declaratory judgment and injunctive relief to require the defendants to provide for their relocation in housing which met the standards established by contract between the Housing Authority and the Public Housing Administration. In addition, the tenant plaintiffs stated that they were eligible for low-rent public housing maintained by the defendant Housing Authority and asked for a declaratory judgment and injunctive relief against a policy of racial segregation in the operation of the public housing, alleging that such a policy violated their rights under the Fourteenth Amendment. The court held that the relief prayed for by the plaintiffs was not

**common to the two types of plaintiffs, i.e., tenants and property owners, so as to allow a class action, and dismissed the complaint.**

LYNNE, District Judge.

#### MEMORANDUM OPINION

The substituted complaint filed in behalf of plaintiffs purports to present a spurious class action as permitted by the liberal provisions of Rule 23(a)(3), Federal Rules of Civil Procedure.

Imprecise averments, commingling allegations of fact and legalistic arguments, have complicated the task of distilling the essence of such complaint in testing its sufficiency as against the motion to dismiss.

It seems clear that the nominal plaintiffs and those whom they claim to represent are divided into two well defined classes, referred to herein as owners and tenants.

There is one common denominator. All plaintiffs are Negro citizens of the United States, residing on a site within the City of Birmingham, Alabama, which is being cleared and prepared by defendants<sup>1</sup> for the construction and operation of hospital facilities and services. All of them have been, are being, or will be moved out of the affected area.

Federal financial aid for such project was obtained by defendants from the Public Housing Administration under a contract which contained the provisions required by 42 U.S.C.A. § 1455 (c).<sup>2</sup>

1. The defendant, Housing Authority of the Birmingham District, is a public body corporate, an instrumentality of the State of Alabama, established by and acting pursuant to Title 25, Code of Alabama 1940, Chapters 2 and 10. The individual defendants are its chairman, acting members, and its secretary and executive director, respectively.
2. § 1455. Requirements for financial-aid. Contracts for financial aid shall be made only with a duly authorized local public agency and shall require that-

(c) There be a feasible method for the temporary relocation of families displaced from the project area, and that there are or are being provided, in the project area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the project area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and reasonably accessible to their places of employment: Provided, That in view of the existing acute housing shortage, each such contract entered into prior to July 1, 1951, shall further provide that there shall be no

Defendants manage and control six low-rent public housing projects, constructed and operated by them under contracts with the Public Housing Administration which contain the provisions required by 42 U.S.C.A. §§ 1410(g)<sup>3</sup> and 1415(8)(c).<sup>4</sup>

Owners contend that defendants have breached their contract with the Public Housing

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demolition of residential structures in connection with the project assisted under the contract prior to July 1, 1951, if the local governing body determines that the demolition thereof would reasonably be expected to create undue housing hardship in the locality.

3. § 1410(g) Every contract made pursuant to this chapter for annual contributions for any low-rent housing project shall require that the public housing agency, as among low-income families which are eligible applicants for occupancy in dwellings of given sizes and at specified rents, shall extend the following preferences in the selection of tenants:

First, to families which are to be displaced by any low-rent housing project or by any public slum-clearance or redevelopment project initiated after January 1, 1947, or which were so displaced within three years prior to making application to such public housing agency for admission to any low-rent housing; and as among such families first preference shall be given to families of disabled veterans whose disability has been determined by the Veterans' Administration to be service-connected, and second preference shall be given to families of deceased veterans and servicemen whose death has been determined by the Veterans' Administration to be service-connected, and third preference shall be given to families of other veterans and servicemen;

Second, to families of other veterans and servicemen and as among such families first preference shall be given to families of disabled veterans whose disability has been determined by the Veterans' Administration to be service-connected, and second preference shall be given to families of deceased veterans and servicemen whose death has been determined by the Veterans' Administration to be service-connected.

4. § 1415(8)(c)

(8) Every contract made pursuant to this chapter for annual contributions for any low-rent housing project initiated after March 1, 1949, shall provide that-

(c) in the selection of tenants (i) the public housing agency shall not discriminate against families, otherwise eligible for admission to such housing, because their incomes are derived in whole or in part from public assistance and (ii) in initially selecting families for admission to dwellings of given sizes and at specified rents the public housing agency shall (subject to the preferences prescribed in section 1410(g) of this title) give preference to families having the most urgent housing needs, and thereafter, in selecting families for admission to such dwellings, shall give due consideration to the urgency of the families' housing needs; and . . .

Administration by failing or refusing to provide each of them, severally, with other housing accommodations in accordance with the provisions of such contract incorporating the requirements of 42 U.S.C.A. § 1445(c). There is no claim that any one of them is eligible to occupy a low-rent housing project. Their prayers are for a declaratory judgment that defendants are under a duty to each of them to provide for his relocation in housing which meets the contract standards and, by injunction, to restrain defendants from requiring each of them to vacate his present dwelling before offering him such other housing.

Tenants likewise assert the breach by defendants of the Section 1445(c) provisions of the contract. Each of them is eligible for low-rent housing and asserts a preference as to vacancies in the six projects referred to above as required by the Section 1410(g) and Section 1415(8)(c) provisions of the pertinent contracts. They, too, pray for similar declaratory judgment and injunctive relief. There the parallel ends. An unrelated claim is made by tenants who insist that a strict policy of racial segregation is pursued by defendants with regard to the six low-rent projects in violation of the Fourteenth Amendment. Three of them are reserved for white occupancy, exclusively; three for Negro occupancy, exclusively. An additional prayer for declaratory and injunctive relief to proscribe discrimination solely because of race and color is introduced in their behalf.

It is at once apparent that a common relief in behalf of the two distinct classes of plaintiffs is not sought, as required by Rule 23(a)(3), Federal Rules of Civil Procedure. Indeed, it is candidly admitted in the complaint that owner plaintiffs are entitled to only a part of the relief

which tenant plaintiffs seek. This will not at all do. Moore's Federal Practice, Second Edition, § 23.10(6), p. 3455, et seq.

Moreover, the serious question of constitutional law raised by tenants in their claim of discrimination violative of the Fourteenth Amendment is not common to the owners' complaint. Thus the threshold question of jurisdiction might be decided against the owners because of lack of diversity of citizenship and in favor of tenants because their cause of action arises under the Constitution of the United States.

No citation of authorities is required to demonstrate that this complaint must be dismissed; that these plaintiffs who joined together voluntarily may no be put asunder by arbitrary action of the court. Since the foregoing views were announced at the conclusion of oral arguments on the motion to dismiss the original complaint, which motion was granted, with leave to amend, and since the parties did not decide among themselves which class should go forward with the litigation in the amended or substituted complaint, the court is persuaded that the action should now be dismissed without leave to amend or to file another substituted complaint.

[Order]

In conformity with the memorandum opinion of the court filed contemporaneously herewith:

It is ORDERED, ADJUDGED and DECREED by the court that this action be and the same is hereby dismissed and that the costs of court incurred herein be and the same are hereby taxed against plaintiffs, for which execution may issue.

Done, this the 30th day of November, 1956.

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## GOVERNMENTAL FACILITIES Public Housing—Georgia

**Prince HEYWARD et al. v. PUBLIC HOUSING ADMINISTRATION et al.**

United States Court of Appeals, Fifth Circuit, November 30, 1956, 238 F.2d 689.

**SUMMARY:** Negro citizens of Savannah, Georgia, brought a class action in federal district court against the federal Public Housing Administration and the Savannah Housing Authority and its officers. The complaint sought a declaratory judgment and an injunction to require the admission of the plaintiffs to a public housing project restricted to white persons, as well as money damages. Having granted a motion for summary judgment by the Public

**Housing Administration**, the district court dismissed the action as to the Savannah Housing Authority, holding that the separate-but-equal public housing facilities furnished by the Housing Authority for Negroes fulfilled the plaintiffs' constitutional rights. 135 F.Supp. 217, 1 Race Rel. L. Rep. 347 (S. D. Ga. 1955). On appeal the United States Court of Appeals for the Fifth Circuit reversed in part and remanded. That court held that, as to the Public Housing Administration, substantial issues were raised by the plaintiffs which were not determined by the action on the motion for summary judgment and that plaintiffs were entitled to a trial on the question of the involvement of that agency in racial discrimination. As to the Savannah Housing Authority, the court held that, if every claim made by the plaintiffs were provable, the complaint stated a valid cause of action under the federal Civil Rights Acts and should not have been dismissed without a trial on the merits.

Before HUTCHESON, Chief Judge, and BORAH and BROWN, Circuit Judges.

BORAH, Circuit Judge.

This is an appeal from two orders entered by the district court dismissing an action brought by Prince Heyward and seventeen other Negro citizens of the United States, residents of Savannah, Georgia, in their own behalf and in behalf of other Negroes similarly situated, against two groups of defendants, (1) the Public Housing Administration,<sup>1</sup> and its Atlanta Field Office Director, Arthur Hanson, and (2) the Housing Authority of Savannah, Georgia,<sup>2</sup> and its officers,<sup>3</sup> praying for a declaratory judgment, injunctive relief, and an award of \$5,000 damages to each plaintiff against each defendant. The jurisdiction of the court below was invoked pursuant to 28 U.S.C. 1331,<sup>4</sup> on the ground that the action arises under the Constitution and laws of the United States and more than \$3,000 is in controversy and 28 U.S.C. 1343(3),<sup>5</sup> on

the ground that the plaintiffs seek redress for deprivation of their civil rights.

[*Gist of Complaint*]

The gravamen of the complaint which was filed on May 20, 1954, is that defendants, as public officers, are jointly enforcing a policy of racial segregation in public low-rent housing projects in Savannah, in violation of the rights secured to plaintiffs by the Fifth and Fourteenth Amendments to the Federal Constitution, and the United States Housing Act of 1937, as amended,<sup>6</sup> the National Defense Housing Acts,<sup>7</sup> and the Civil Rights Statute.<sup>8</sup> Within the delay for answering, Savannah Housing Authority, hereinafter called SHA, and its officers filed a motion to dismiss the complaint and with reservation of their rights under the motion they also filed an answer, a motion for a more definite statement, and a motion to strike certain portions of the complaint. The record reflects that no answer was filed by either Public Housing Administration, hereinafter called PHA, or Hanson. Approximately one year after the complaint was filed and on May 5, 1955, plaintiffs served upon PHA, Hanson, SHA and Stillwell, a request for admission of facts to which SHA and Stillwell timely replied, but no response thereto was ever filed by either PHA or Hanson. However, on June 14, 1955, PHA and Hanson filed a motion for summary judgment and, in support thereof, an affidavit of Charles E. Slusser, Commissioner of PHA. Thereafter, and prior to the hearing on the defendants' respective motions for summary judgment and to dismiss, plaintiffs propounded interrogatories to Stillwell, Secretary-Director of SHA, which were duly answered

1. A corporate agency and instrumentality of the United States established pursuant to Reorganization Plan No. 3, effective July 7, 1947. (5 U.S.C.A. 133y-16.)

2. A corporate body organized under the laws of the State of Georgia which administers the low-rent housing program of the City of Savannah. 99 Georgia Code Ann. 1101 *et seq.*

3. W. Horace Stillwell, Herbert L. Kayton, Wm. H. Stephens, James A. Byington, J. R. Burney and Joseph F. Griffin, Jr.

4. 28 U.S.C. 1331 provides: "That district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

5. 28 U.S.C. 1343 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: \* \* \* (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

6. 42 U.S.C. 1401 *et seq.*

7. 42 U.S.C. 1501 *et seq.*

8. 42 U.S.C. 1983.

by him. On September 29, 1955, which was one day prior to the date fixed for the hearing on defendants' previously filed motions, plaintiffs filed a written notice which recited that they would in accordance with the attached motion move on October 10, 1955, for a summary judgment against SHA and its officers. At the hearing on defendants' motion which was had on the following day, plaintiffs' counsel asked the court to consider also at that time their proposed motion for summary judgment, and this request was denied. Thereafter, and upon consideration of the arguments and briefs and without entertaining a hearing on plaintiffs' motion for summary judgment, the court on October 15, 1955, issued an order granting the motion of PHA and Hanson for summary judgment, and on October 21, 1955, granted the motion of the remaining defendants to dismiss. This appeal followed.

[*Theory of Complaint*]

In considering the propriety of the district court's action, it would now appear in order to set forth the theory of plaintiffs' complaint and the essential allegations made in support of their claim for relief. The complaint in substance alleges: that PHA and SHA, pursuant to the provisions of the Housing Act of 1937, as amended, have constructed and agreed to construct, operate and maintain several public housing projects in the City of Savannah, some of which are and will be located on the site of the residences or former residences of the plaintiffs; that pursuant to the provisions of the National Defense Housing Acts, PHA holds title to certain other public housing projects in Savannah which are operated by SHA as agent for PHA; and that the entire public housing program in Savannah has been jointly planned, constructed, operated, and maintained by PHA and SHA pursuant to the provisions of the aforementioned housing acts and the laws of the State of Georgia. In this connection plaintiffs allege that in administering the entire public housing program PHA and SHA have determined upon and presently enforce an administrative policy of racial segregation resulting in the designation of certain projects for occupancy by qualified white families and in the designation of other projects for occupancy by qualified Negro families; that it is the practice and policy of each of the defendants to require

applicants for public housing to state a preference for admission to a particular project and "that this information is put on the application blank prepared for the purpose of taking applications for public housing and that such information is in fact and effect a device for discriminating against the Plaintiffs and the members of the class which they represent, solely because of their race or color;" and that pursuant to the racial segregation policy, plaintiffs and others similarly situated, solely because they are Negroes, are denied the rights and preference to occupy housing projects, including those operated by SHA as agent for PHA, which have been limited to white occupancy by the defendants. It is also alleged that each of the plaintiffs has been or will be displaced from the site of his or her residence and adjacent areas which have been condemned by or on behalf of SHA for the purpose of constructing thereon, certain low-rent housing projects, one of which is known as Fred Wessels Homes; that each of the plaintiffs meets all of the requirements established by law for consideration for admission and for admission to the project built on or to be built on the site of his or her former residence, and to certain other public housing projects in Savannah all of which have been limited by defendants to occupancy by white families. The complaint further alleges that white families which have not been displaced from the site of any low-rent housing project or slum-clearance project initiated after January 1, 1947, and whose housing needs are not or were not as urgent as those of the plaintiffs have been admitted to Fred Wessels Homes and to other projects limited to white occupancy, where as each of the plaintiffs desires to live in Fred Wessels Homes, and each has been denied admission to Fred Wessels Homes, solely because of race and color, despite the fact that at the time said project was ready for occupancy, each of the plaintiffs had a preference for admission by virtue of the fact that each was or is among those having the greatest urgency of need among low-income families eligible for public housing in Savannah. Finally, it is alleged that each of the defendants is under a duty to discharge his or its duties in conformity with the Constitution, laws and public policy of the United States, and that plaintiffs have no adequate remedy at law to protect their "civil and constitutional right not to be discriminated against by the State and Federal

Governments, solely because of race, in leasing an interest in real property." The relief prayed is that the court declare the rights and other legal relations of the parties as to the subject-matter in controversy,<sup>9</sup> and that the court enjoin defendants and their agents: (1) from refusing to accept plaintiffs' applications for certain public housing projects; (2) from refusing to certify plaintiffs as eligible for certain housing projects; (3) from refusing to admit plaintiffs to any public housing unit for which they are eligible, solely because plaintiffs are Negroes; (4) from pursuing a policy of racial segregation in public housing; (5) from refusing to extend the statutory preferences for the admission of plaintiffs to certain projects;

9. The prayer of the complaint contains the following:
  2. Enter a final judgment and decree declaring that the Defendants and each of them:
    - (a) may not refuse to accept the applications of the Plaintiffs for admission to public housing projects limited to occupancy by white families;
    - (b) must give the Plaintiffs' applications for public housing the same consideration as is given to the applications of white families for public housing;
    - (c) must not discriminate against the Plaintiffs, solely because of race or color, in certifying applicants for public low-rent housing;
    - (d) must not discriminate against the Plaintiffs and other Negroes similarly situated with respect to their admission to any unit in any public housing project, solely because of race and color;
    - (e) must extend the statutory preferences for admission to any available unit in any public housing project in the City of Savannah, Georgia, without considering the race or color of the Plaintiffs and all other Negroes similarly situated;
    - (f) may not lawfully pursue a policy of racial segregation in public housing by constructing, operating and maintaining separate public housing projects for eligible Negro and white families or by segregating families on the basis of race within a project;
    - (g) may not lawfully classify applicants for public housing on the basis of race for any purpose with respect to their applications for, or admissions to, or residence in any public housing project;
    - (h) may not require Plaintiffs to state a preference for admission to a particular project upon applying for public housing;
    - (i) may not lawfully determine upon and enforce an administrative policy of racial segregation in public housing projects which results in the exclusion of Plaintiffs and others similarly situated from housing units for which they are otherwise eligible and for which they have a preference for admission, solely because of race and color, especially where such projects are constructed, operated or maintained with federal financial and/or other federal assistance; and declaring,

(6) from classifying plaintiffs and others similarly situated on the basis of race for any purpose with respect to their applications for or admissions to, or residence in, any public housing project; (7) from requiring plaintiffs to state a preference for admission to a particular project upon making application for admission to any public housing project; and, (8) from segregating plaintiffs within any project to which they are admitted. Additional injunctive relief is prayed to enjoin PHA from giving federal financial and other federal assistance to SHA for the construction, operation, or maintenance of any project which excludes plaintiffs and other Negroes similarly situated, solely because of race or color. Finally, plaintiffs pray that each of them be awarded damages in the amount of \$5,000 against each and all of the defendants, and that the Court grant such other and additional relief as may appear to be equitable and just.

[Action of District Court]

The district court granted the motion of defendants PHA and Hanson for summary judgment and dismissed the complaint as to them on the following grounds: (1) that the Court lacks jurisdiction under 28 U.S.C. 1331 because the complaint fails to show that the matter in controversy as to each plaintiff exceeds \$3,000; (2) that the Court lacks jurisdiction under 28 U.S.C. 1343(3) because defendants were not acting under color of any state law; (3) that the Court lacks venue of the action under 28 U.S.C. 1331 in that PHA is not a corporation doing business in the Southern Judicial District

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- "(j) that Defendant Public Housing Administration, its agents, employees, representatives and successors may not give federal financial assistance and other federal assistance to the Defendant Housing Authority of Savannah, Georgia for the construction, operation and maintenance of any public housing project from which the Plaintiffs and other Negroes similarly situated will be excluded and denied consideration for admission and denied admission solely because of race and color; and
  - "(k) declaring that enforcement of racial segregation in public housing violates rights secured to the Plaintiffs, and other Negroes similarly situated, by the due process clause of the Fifth Amendment to the Federal Constitution, the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution and Title 8, United States Code, Section 42 and Title 42, United States Code, Section 1410(g) and 1415(g)(c) and 1501 et seq."

of Georgia within the meaning of the venue statute; (4) that the plaintiffs lack sufficient legal interest in the expenditure of federal funds by PHA to give them standing to challenge the validity of such expenditure; (5) that PHA, by placing in its contracts with SHA a requirement that the latter shall extend the preference in occupancy required by 42 U.S.C. 1410(g) has fulfilled its obligations under that statutory provision; (6) that in view of the fact that PHA has left to the determination of SHA the policy as to whether low-rent housing projects shall be occupied by any particular race, there is no justifiable controversy between plaintiffs and PHA and Hanson; and (7) that in view of the fact that Hanson has no official function or duty with respect to dispensing or withholding of federal funds to SHA plaintiffs failed to make out a claim against him.

The district court also dismissed the complaint as to SHA and its officers on the ground that since it appears from the complaint that plaintiffs are afforded equal though separate housing facilities, their civil and constitutional rights have in no wise been violated.

[*Dismissal as to PHA*]

Considering first the order dismissing the complaint as to PHA and Hanson, we are in no doubt that the trial court erred in ruling that the complaint fails to show that the matter in controversy as to each plaintiff exceeds the jurisdictional amount and that the court lacked venue of the action. In the first place we take it to be fundamental that a motion for summary judgment applies to the merits of a claim, or to matter in bar, but not to matter in abatement.<sup>10</sup> Motions suggesting improper venue or lack of jurisdiction for failure to show jurisdictional amount present clearly matters in abatement only which must be raised not by a motion for summary judgment, but by motions under Rule 12(b), Federal Rules of Civil Procedure. In this connection it is important to note that under the terms of Rule 12(b), such defenses are not integrated with the motion for summary judgment.<sup>11</sup> But apart from the fact

10. See Moore's Federal Practice, 2 Ed., Vol. 6, p. 2025.

11. Rule 12(b) provides in part, as follows: ". . . the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue . . . (6) failure

that these questions were improperly raised and disposed of under Rule 56, Federal Rules of Civil Procedure, and the further fact that the district judge improperly considered the merits of a cause in which he was of the declared opinion that jurisdiction was wanting, we think it plain that the allegations of the complaint adequately established that the requisite jurisdictional amount is here present. The applicable rule with respect to the amount in controversy is relatively simple and is this: When a complaint contains a formal allegation that the amount in controversy exceeds \$3,000 and is not traversed, such allegation is deemed sufficient to confer jurisdiction on the federal court, unless it appears to a legal certainty that the other allegations of the complaint so qualify or detract from it that it cannot fairly be said that jurisdiction appears on the face of the complaint. See KVOS, Inc. v. Associated Press, 299 U.S. 269. Here, the allegation of jurisdictional amount was not traversed. To the contrary, on the face of their motion for summary judgment these defendants asserted that "there is no genuine issue as to any material fact", and the supporting affidavit does not challenge or contradict the amount alleged to be in controversy. And we cannot on this record say to a legal certainty that the matter in dispute does not involve the requisite jurisdictional amount. As to venue of the action we deem it sufficient to say that there appears in the record no formal objection to venue, and PHA by filing the motion for summary judgment and thus putting at issue the merits of the case effectively waived whatever objection to venue as it may have had.

[*Civil Rights Acts*]

Coming now to the plaintiffs' claim for relief under the Civil Rights Statute, we find ourselves in accord with the trial court's ruling that neither PHA nor Hanson is acting under color of any State law within the requirements of 28 U.S.C. 1343(3). Plaintiffs' case against PHA is bottomed on the proposition that the regulation and control exercised by the federal agency is so extensive and the relationship between the

to state a claim upon which relief can be granted . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ."

federal agency and SHA so intimate that the actions of the one must be deemed to be the acts of the other and pursuant to State law or custom. It clearly appears, however, from the pleadings, the affidavit of Commissioner Slusser and the several exhibits attached thereto, as well as from the state and federal statutes themselves that PHA and Hanson acted pursuant to the federal statutes and have not acted or purported to act under any State law, regulation, custom or usage.

We are also in agreement with the findings of the district judge which fully support his conclusion that plaintiffs had failed to make out a claim against Hanson upon which relief could be granted. The evidence clearly showed that Hanson has no official function or duty with respect to dispensing or withholding of federal funds to SHA. The affidavit of the Commissioner of PHA shows that Hanson was not responsible for final approval of any local development program, and "in no instance and under no circumstances does the Field Office Director or any other Field Office Official disburse to, or withhold from, any local authority Federal funds pursuant to [contracts] between the Public Housing Administration and the local authority."

#### [Summary Judgment as to PHA]

There remains for consideration the question of whether PHA was entitled to summary judgment on plaintiffs' claim arising under the Constitution and laws of the United States. The court below answered this question in the affirmative but did not mention the statutes involved. Insofar as the complaint challenges acts of PHA in connection with Lanham Act, national defense housing projects, we think the action was properly dismissed for the reason that it is a suit against a federal agency which is not subject to be sued. 42 U.S.C. 1404(a). Furthermore, the evidence shows that PHA does not make any financial contributions with respect to such defense housing projects and decisions as to occupancy of these projects are solely the responsibility of SHA to which they have been conveyed.

But with reference to PHA functions in connection with the low-rent housing projects, we think the trial judge erred in concluding that PHA was entitled to summary judgment. This court has consistently adhered to the view that a summary judgment should only be given

when it is quite clear what the truth is. American Insurance Co. v. Gentile Bros. Co., 5 Cir., 109 F.2d 732. One who moves for summary judgment has the burden of demonstrating clearly that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him. In the case at bar we cannot say that PHA sustained its burden of proving that there existed no genuine issue of fact. Here, as in Heyward, et al. v. Public Housing Administration, et al., D.C. Cir., 214 F.2d 222, plaintiffs are seeking an adjudication whether, without violating rights secured to them under the Fifth Amendment and the federal housing acts cited above, PHA could give federal financial and other assistance to SHA in connection with projects from which plaintiffs are denied consideration for admission and admission solely because of their race and color. While it is true that PHA has not been charged by Congress with the duty of preventing discrimination in the leasing of housing project units, what these plaintiffs are saying in effect is that the federal agency is charged with that duty under the Fifth Amendment, and that that duty should be forced upon PHA by the courts through the medium of injunctive process. The record shows that the involvement of PHA in the low-rent housing program in Savannah consists of a contractual guarantee to various banks and lending institutions that money advanced by them for the construction of the projects by the local agency will be repaid, incidental to which is the prescribing of conditions upon which the PHA will undertake to render such assistance. These conditions consist of certain requirements which undoubtedly touch the projects at a great many points. They have to do with architectural and developmental plans, the amount and terms of financial aid and continuing obligations to render financial assistance. With reference to occupancy policies, it is plain that the challenged policy, though initiated by SHA, has been approved by PHA, by way of contractual arrangements between the state and federal agencies.

The statutory preference under which plaintiffs claim the right to occupy the low-rent housing projects provides, in 42 U.S.C. 1410(g), that the following preferences shall be extended in the selection of tenants:

"... First, to families which are to be displaced by any low-rent housing project

or by any public slum-clearance or redevelopment project initiated after January 1, 1947, or which were so displaced within three years prior to making application to such public housing agency for admission to any low-rent housing . . ."

and, in 42 U.S.C. 1415(8)(c),

"in the selection of tenants (i) the public housing agency shall not discriminate against families otherwise eligible for admission to such housing, because their incomes are derived in whole or in part from public assistance and (ii) in initially selecting families for admission to dwellings of given sizes and at specified rents the public housing agency shall (subject to the preferences in section 1410(g) of this title) give preference to families having the most urgent housing needs, and thereafter, in selecting families for admission to such dwellings, shall give due consideration to the urgency of the families' housing needs . . ."

As we have noted above, the complaint sets forth allegations which, if proven, would show a failure on the part of PHA to comply with the above statutory tenant selection policy, and this would constitute a violation of plaintiffs' rights to due process under the Fifth Amendment. The view thus expressed is in accord with the Supreme Court decision in *Bolling v. Sharpe*, 347 U.S. 497, wherein it was said: "In view of our decision that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." With reference to the aforementioned statutory occupancy policy, Commissioner Slusser in his affidavit states that the "policy of Public Housing Administration with respect to occupancy of any low-rent housing project is that, subject only to the provisions of the Housing Act of 1937, as amended, and regulations promulgated by Public Housing Administration thereunder, decisions as to occupancy are the administrative responsibility of the Housing Authority of Savannah." The regulations to which Slusser refers are to be found in PHA's Housing Manual, dated February 21, 1951, at Section 102.1, and they are as follows:

"The following general statement of racial policy shall be applicable to all low-rent housing projects developed and operated under the United States Housing Act of 1937, as amended.

"1. Programs for the development of low-rent housing, in order to be eligible for PHA assistance, must reflect equitable provision for eligible families of all races determined on the approximate volume of their respective needs for such housing.

"2. While the selection of tenants and the assigning of dwelling units are primarily matters for local determination, urgency of need and the preference prescribed in the Housing Act of 1949 are the basic statutory standards for the selection of tenants." (Emphasis supplied.)

Thus, at the time this action was filed the regulations of PHA required that any local program for the development of low-rent housing reflect equitable provision for eligible families of all races, but did not require that housing be made available on a nonsegregated or nondiscriminatory basis. Plaintiffs' argument is that under these regulations the local authority would have no right to admit Negro applicants to vacant units, no matter what their priority is under the statutory preference provision, if to do so would deviate from the application of the "equity" formula which is written into each of the contracts between the federal and local agencies. Furthermore, there is nothing in the affidavit, exhibits, or pleadings filed in this cause which indicates that PHA will or will not continue to require SHA to abide by the above regulation.

#### [Case Against SHA]

The answer of SHA and its officers, on the other hand, categorically denies that plaintiffs were qualified for or had been denied any statutory preference for admission to public housing projects, or that plaintiffs were required to state a preference for admission to a particular project. And the averment is made that the low-rent housing projects are constructed, operated and maintained solely by SHA and not by PHA or jointly with PHA; that separation of white and colored families in projects is not based solely upon the fact that the colored tenants are Negroes, but largely to preserve the peace and good order of the community;

and that the rights of the white tenants which are guaranteed by the Fifth and Fourteenth Amendments to the Constitution and the laws of the United States would be violated if integration of whites and Negroes were to be forced. This being the state of the record we think it plain that no convincing showing has been made that plaintiffs could not prevail under any circumstances, nor do the facts show a right to judgment with such clarity as to leave no room for controversy. Cf. Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, p. 75.

[*"Treacherous Record"*]

Moreover, as was stated by the Supreme Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257, summary procedures "present a treacherous record for deciding issues of far-flung import." Cf. *Pacific American Fisheries v. Mullaney*, 9 Cir., 191 F.2d 137. Here, we have an extremely important question, undoubtedly affecting a large percentage of the low-cost housing development programs, and ultimately affecting the living standards of a great number of persons, white and colored, who are in urgent need of decent, safe and sanitary dwellings. No conclusion in such a case should prudently be rested on a indefinite factual situation and especially should no declaratory judgment or injunction issue, if there should be occasion to do so, on anything but clear-cut judicially determined facts.

Turning now to the order which dismissed the complaint as to SHA and its officers for

failure to state a claim upon which relief could be granted, appellants insist that the district court's holding was plain error and may not stand. We agree with appellants. Viewing the complaint in the light most favorable to appellants and with every intendment regarded in their favor, we think that the complaint sets forth a claim under the Civil Rights Statute, and that claim is: that appellants were not permitted to make application for any project limited to white occupancy, that they are denied the right to lease housing facilities provided by public funds under conditions set forth in the statute and equal to those imposed upon white families, and that such action on the part of SHA and its officers constituted a deprivation under color of State law, custom, or usage of the rights guaranteed them by the Fourteenth Amendment to the Constitution and the federal housing acts. Accordingly, we think it plain that the complaint should not have been dismissed on motion without a hearing on the merits, where, as here, it does not appear to a certainty that plaintiffs would be entitled to no relief under any state of facts which could be proved in support of their claim.

The order granting summary judgment to PHA and Hanson is accordingly affirmed in part and reversed in part, and the order dismissing the action against SHA and its officers is reversed, and the case is hereby remanded to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED  
IN PART AND REMANDED.

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GOVERNMENTAL FACILITIES  
Housing—Connecticut

See *McKinley Park Homes v. Commission on Civil Rights* at p. 160.

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## GOVERNMENTAL FACILITIES

### Restaurants—Texas

**W. F. (Dec) DERRINGTON and Harris County, Texas, acting by its County Judge and Commissioners v. M. W. PLUMMER et al.**

United States Court of Appeals, Fifth Circuit, December 19, 1956, No. 16151.

**SUMMARY:** Negroes in Harris County, Texas, brought an action in federal district court seeking to restrain county officials and the lessee of a restaurant operated in the county court house from denying service in the restaurant to Negroes. The county officials defended on the ground that the restaurant was leased to a private individual for operation and that the lessee could legally restrict his service to whomever he chose. The district court held that the county, having undertaken to furnish eating facilities, must afford substantially equal facilities for all persons regardless of race or color, under the Equal Protection Clause of the Fourteenth Amendment. The court further held that the lessee's operation of the restaurant was governmental action and that the lessee had a similar duty not to exclude Negroes from the restaurant solely on the basis of race or color. *Sub nom. Plummer v. Case, 1 Race Rel. L. Rep. 532 (S. D. Tex. 1955)*. On appeal the Court of Appeals, Fifth Circuit, affirmed, holding that the actions of the lessee in operating the restaurant were as much "state action" as if the county itself were the operator and therefore within the reach of the Fourteenth Amendment.

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge.

The district court, upon a thoughtfully considered memorandum opinion,<sup>1</sup> permanently enjoined Harris County, Texas,

"from renewing or extending the present lease, or from executing a new lease, or otherwise divesting itself of management and control of the premises comprising the Courthouse cafeteria without specific assurances that facilities will be made available for the use of colored persons under circumstances and conditions substantially equal to those afforded members of the white race,"

and further enjoined the lessee Derrington,

"after ninety (90) days from December 29, 1955, from excluding members of the colored race from patronage in the said cafeteria solely by reason of their race or color under the circumstances here prevailing."

From that decree both Harris County and its lessee Derrington appeal.

The facts are mostly stipulated and entirely undisputed. A new courthouse for Harris County was completed in the summer of 1953. A part of the basement was planned for operation as a restaurant or cafeteria and was fur-

nished and equipped by the County for such purpose. As the building neared completion, the County advertised for bids for the lease of such space. Derrington was the successful bidder.

#### [Terms of Lease]

The County leased to Derrington for a term beginning June 10, 1953 and ending December 31, 1954,<sup>2</sup>

"\* \* \* all of that certain space in the basement of the Harris County Court House in Houston, Harris County, Texas, known as the cafeteria space and being the room which is appropriately furnished and equipped for the operation of a cafeteria, together with the small rooms adjoining it which were built to be used in conjunction therewith."

The rental was admittedly adequate, 20% of the gross sales of the cafeteria or not less than \$750.00 per month. The County agreed to provide water service, lighting, heating and air conditioning of the premises, and such water and electricity as is reasonably necessary to the conduct of the cafeteria business by Derrington.

1. Reported at 1 Race Relations Law Reporter 532.

2. Subsequently renewed from January 1, 1955 through December 31, 1956, as hereafter detailed.

On his part, Derrington agreed to "operate a first class cafeteria", to "keep this cafeteria open at all such times as the Court House is open," to "abide by all Federal or State regulations as to policy, limitations on meals, food stuffs, drinks, etc., sold in this restaurant," and not to

"permit in the demised premises any disorderly conduct or any conduct or practice in violation of any ordinance of the City of Houston or of any State or Federal Law, or of a sort likely to bring discredit upon Harris County or its Court House."

Employees of Harris County were to be given a 10% reduction in the price of foods and drinks "through the use of coupons or meal tickets or other means as may be determined by the Commissioners Court of Harris County."

The district court found and we agree that the original lease agreement "was in all respects a bona fide and arms length transaction, and entered into in compliance with all requirements of law."

On the trial, the County's attorney stated,

"\* \* that under Paragraph XIV of the lease as stipulated, that there is a renewal and optional agreement in there that would enable this man on five days' notice to renew and extend this particular lease."

It was in fact stipulated that before the execution of the renewal lease covering the term from January 1, 1955 through December 31, 1956.

"\* the said \* \* Derrington had \* timely and in the manner provided in said lease given said County notice of his intention to exercise his option to continue and renew said lease upon the same terms and provisions contained in the original lease."

The same paragraph XIV is contained in the second lease.<sup>3</sup>

3. Paragraph XIV, as contained in each lease, reads as follows:

"Lessee shall have the option of leasing and operating any other restaurant or cafeteria which the Lessor may elect to establish in the Harris County Court House, the Civil Courts Building, or any other building owned by Harris County lying within a one block area of said Court House upon the same terms and conditions as set out in this instrument. After notice of intention to operate such a unit is given by Lessor to Lessee, Lessee shall have five (5) days within which to exercise such option. Thereafter Lessor may contract with any other person, corporation or firm concerning such unit." Absent the stipulation, it is not clear to us that this is an option to renew the lease.

There are numerous cafes and eating places for white people and for negroes within a five block radius of the courthouse.

During the original period of the lease, appellees undertook to purchase food in the cafeteria and Derrington refused them permission solely because they were negroes. This class suit followed. Subsequently, the renewal lease was executed with knowledge on the part of both the County and Derrington that the suit raised issues of alleged violation of appellees' civil rights by reason of the denial to them of the use and benefit of the cafeteria. It was further stipulated that if the appellees or any other negroes were again to present themselves for service at the cafeteria,

"Derrington would contend it to be his right to refuse to serve plaintiffs and such members of the Negro race in a like manner for any reason, and would probably refuse to serve members of the Negro or colored race for the sole reason that they were members of the Negro or colored race."

#### [Case Not Moot]

The acts of racial discrimination, both those committed and those immediately in prospect, are the acts of Derrington, the lessee. Derrington's second lease expiring December 31, 1956, before our mandate can become effective, it might be, though it is not, contended that the case would thereby become moot. If Derrington does not have an option to renew his lease (see footnote 3, *supra*), it may be renewed by mutual agreement, or the County may lease to another who will practice like discrimination. Even if there had been a voluntary cessation of the alleged illegal conduct, the public interest in having the legality of the practice settled militates against a mootness conclusion in the absence of an affirmative showing that there is no reasonable expectation that the alleged wrong will be repeated. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 633. See also *United States v. Freight Ass'n*, 166 U.S. 290; *United States v. U.S. Steel Corp.*, 251 U.S. 417; *Trade Comm'n v. Goodyear Co.*, 304 U.S. 257; *Walling v. Helmerich & Payne*, 323 U.S. 37; *United States v. Oregon Med. Soc.*, 343 U.S. 326.

On the merits the decisive question is whether the action of the lessee, Derrington, is merely private conduct or may fairly be said to be

conduct of the County and thus State action within the inhibition of the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3; *Shelley v. Kraemer*, 334 U.S. 1.

No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person. Those principles do not, however, control the decision of this case for several reasons.

[*Remains County Property*]

Assuming no purpose of discrimination on the part of the County in the renewal of the lease, and further assuming no express reservation of control by the terms of the lease to prevent discrimination, neither of which assumptions is beyond question, and pretermitted the legal effect of the County's furnishing water, electricity, heating and air conditioning services to its lessee, the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of

the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.

Further, the express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself. *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971, reversing 6th Cir., 202 F.2d 275, which had affirmed W.D.Ky., 102 F.Supp. 525; *Department of Conservation & Development v. Tate*, 4th Cir., 231 F.2d 615, affirming E.D.Va., 133 F.Supp. 53; *Lawrence v. Hancock*, S.D.Va., 76 F.Supp. 1004; compare *Nash v. Air Terminal Services*, E.D.Va., 85 F.Supp. 545; see also *City of St. Petersburg, etc. v. Alsup*, 5th Cir., No. 16,100, m/s.

The judgment is therefore

AFFIRMED.

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## GOVERNMENTAL FACILITIES

### Swimming Pools—Florida

**CITY OF ST. PETERSBURG, a municipal corporation, et al. v. Fred ALSUP et al.**

United States Court of Appeals, Fifth Circuit, December 19, 1956, 238 F.2d 830.

**SUMMARY:** Negroes in St. Petersburg, Florida, brought a class action in federal district court against officials of that city. The plaintiffs alleged that they were being unlawfully excluded from the use of a municipal swimming pool and beach because of their race in violation of the Fourteenth Amendment. The city defended on the ground that the operation of the swimming pool and beach was undertaken in the proprietary capacity of the city and therefore not within the reach of the Fourteenth Amendment. The district court held that the Fourteenth Amendment prohibited racial discrimination by the city in any capacity and issued an injunction restraining the city from refusing to allow Negroes to use the municipal pool or beach. 1 Race Rel. L. Rep. 531 (S. D. Fla. 1956). On appeal to the Court of Appeals for the Fifth Circuit the city renewed its contention that its activities in its proprietary capacity were not subject to the Fourteenth Amendment. That court affirmed, stat-

ing that, with the possible exception of actions in a fiduciary capacity (see *Estate of Stephen Girard, supra*, at p. 68), all activities of a municipality are within the inhibitions of the Fourteenth Amendment.

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge.

The district court enjoined the appellants from refusing to allow the appellees and other negroes similarly situated to use the municipal beach and swimming pool on the same basis as white citizens of the municipality. On the authority of *Dawson v. Mayor and City Council of the City of Baltimore*, 4th Cir., 220 F.2d. 386, affirmed 350 U.S. 877, the judgment should be affirmed, unless the cases are distinguishable.

The distinction urged by appellants is that the City of Baltimore operates its parks and swimming facilities in its governmental capacity,<sup>1</sup> while the City of St. Petersburg operates its swimming pool and beach in its proprietary capacity.<sup>2</sup> Further elaborating their position, the appellants argue in brief:

"The appellant City operates the Municipal Spa Beach and swimming pool involved in this litigation in its proprietary capacity. Under the decisions of the Courts it has not only the right but the duty to operate this pool and beach as a business enterprise and for the best interest of the inhabitants of the City who are stockholders, so to speak, in this enterprise."

"The answer avers in substance that the City operated a negro pool in the very heart of the negro area and that said pool operated at a considerable financial loss and was finally forced to close for lack of patronage. It is further alleged that, due to a long social practice and custom, if negroes were admitted to the beach and pool in controversy, white patronage would cease or practically cease and that the City would be forced to close this pool as it would not have sufficient funds to continue its operations.

"If the City is to be charged with the duty and given the legal right to operate this

utility as a private business and for the best interest of the inhabitants of the City, the 14th Amendment has no application. It certainly cannot be said that a forced closing of the pool would be for the best interest of anyone.

"To hold that the 14th Amendment of the Constitution is applicable to a city operating in its proprietary capacity in the light of the numerous decisions defining this method of operation would be to read into the 14th Amendment something that simply is not there, nor ever was intended to be there."

It becomes obvious, at once, that, if appellants' contention be accepted, the Constitution would operate with different effect in Maryland and in Florida; and probably also in various other states. The same contention has been unsuccessfully urged to shield municipalities from their own states and was thus answered in *Trenton v. New Jersey*, 262 U.S. 182, 191-192:

"The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris v. District of Columbia*, 256 U.S. 650, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, con-

1. *Mayor and City Council of Baltimore v. State*, 195 Atl. 571.
2. *Town of Riviera Beach v. State*, 53 So.2d. 828; *Pickett v. City of Jacksonville*, 20 So.2d. 484; *Ide v. City of St. Cloud*, 8 So.2d. 924; *City of Tampa v. Easton*, 198 So. 753; *State v. City of Daytona Beach*, 158 So. 300; *City of Lakeland v. Amos*, 143 So. 744; *Hamler v. City of Jacksonville*, 122 So. 220.

struct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question." (Marginal footnotes omitted.)

The fact that under West Virginia decisions municipal operation of a swimming pool was a proprietary activity has been held by a district court not to alter the constitutional right of an individual citizen to equality of opportunity in the use of the pool. *Lawrence v. Hancock*, S.D. W.Va., 76 F.Supp. 1004, 1008.

[Activities Not Severable]

A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the Fourteenth Amendment. See

*Nixon v. Condon*, 286 U.S. 73, 88. It is doubtful whether a municipality<sup>3</sup> may ever engage in purely private action that would not be action of the state. See *Civil Rights Cases*, 109 U.S. 3; *Buchanan v. Warley*, 245 U.S. 60. Certainly this is not such a case. In its operation of the municipal beach and swimming pool the City of St. Petersburg comes squarely within the broad class long ago defined in *Ex parte Virginia*, 100 U.S. 339, 347:

"Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

It is no answer to say that the beach and pool cannot be operated at a profit on a non-segregated basis, and that the City will be forced to close the pool. Of course, financial loss cannot justify illegal operation; and, unfortunate as closing the pool may be, that furnishes no ground for abridging the rights of the appellees to its use without discrimination on the ground of race so long as it is operated. *Department of Conservation and Development v. Tate*, 4th Cir., 231 F.2d 615, 616.

The judgment is therefore

**AFFIRMED.**

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3. Except possibly in some fiduciary capacity. See *Estate of Stephen Girard*, Pa. Sup. Ct., November 12, 1956, 25 L.W. 2214, 2215, m/s.

## TRANSPORTATION Buses—Alabama

**City of MONTGOMERY, Alabama, a Municipal Corporation, v. MONTGOMERY CITY LINES, Inc., a corporation.**

Circuit Court of Montgomery County, Alabama, In Equity, December 20, 1956, No. 30358.

**SUMMARY:** Following the announcement of the dismissal by the United States Supreme Court of the appeal in *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901, 76 S.Ct. 692, 1 Race Rel. L. Rep. 513 (1956), the operators of a bus transportation system in

**Montgomery, Alabama, directed its employees to cease enforcement of racial segregation on its buses.** The city brought a bill in an Alabama state court to restrain the bus company from violating city ordinances and state laws requiring racial segregation in buses. Holding that the city ordinances and state laws were valid, the court issued a temporary restraining order. 1 Race Rel. L. Rep. 534 (1956). On November 13, 1956, the United States Supreme Court affirmed the decision of a three-judge federal district court in Alabama (*Browder v. Gayle*, 142 F.Supp. 707, 1 Race Rel. L. Rep. 669, [M.D. Ala. 1956]), that required racial segregation in buses in Montgomery was in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and unenforceable. *Gayle v. Browder*, 352 U. S. 903, 77 S.Ct. 145, 1 Race Rel. L. Rep. 1025 (1956). The Montgomery City Lines then moved in the Alabama state court to dissolve the temporary restraining order. The court granted the motion, although expressing its disagreement with the decisions of the federal courts.

JONES, Circuit Judge.

The Respondent files in court a petition for instructions in this cause, averring that the Supreme Court of the United States has affirmed the decree of the local United States District Court, enjoining Respondent, its officials, its bus drivers, and its employes, from enforcing the Alabama State Law, and the Ordinances of the City of Montgomery, Alabama, requiring the separation of the races in the use of bus transportation facilities in Montgomery, and it is shown that on this day the federal injunction has been served on the Montgomery City Lines, its agents, and employees.

[*Order Dissolved*]

The Respondent, in open court, now moves the court for a dissolution of the temporary restraining order issued by this court on May 9, 1956, requiring the bus company to comply with and abide by all the state laws and the city ordinances as to separation of the races.

Under the circumstances, confronted by the United States Supreme Court decision, this state court has no other alternative than to dissolve the temporary restraining order of May 9, 1956.

In doing so, the Court must regrettably note that the decision of the Supreme Court of the United States, declaring void the laws of a sovereign state and the city ordinances for the separation of the races on buses wholly within the city of Montgomery is a decision which, while for the present the law of the land, is based on neither the law nor reason.

The United States Supreme Court in making its decision has spurned and rejected all of its rulings, decisions which have stood for almost a hundred years with the approval of all races.

It has not only swept away, without rime or reason the state law and the city ordinance, but it has also abolished the common law of the State, the wise and ancient custom of the people of both races—a custom which has been observed by both races for nearly a century and which has preserved order within the city.

The decision nullifying the separation of the races on buses wholly within Alabama is the decision of a newly created department of the government; one unknown to the Constitution of the United States, and a department which is rapidly destroying all the great principles for which our forefathers fought and sacrificed and upon which our government is founded.

[*Tenth Amendment*]

The federal decision conveniently forgets the fact that under the Tenth Amendment to the Constitution the powers not delegated to the United States are reserved to the States or their people. Ignoring this amendment the Federal Supreme Court plants its decision on a twisted and tortured construction of the Fourteenth Amendment, an evil construction, a construction behind which stands neither reason nor authority.

Only by the wildest flight of the imagination can it be said that the Fourteenth Amendment denies to a State the right to regulate its own internal affairs and exercise its police power to pass laws providing, in order to secure the public peace, for the separation of the races on buses and trains within the state.

There is not one line, one word, in the Federal Constitution which authorizes the order made by the Supreme Court. On the other hand, the Federal Constitution, its preamble, its Bill of Rights, is absolutely contrary to the Supreme

Court decision with reference to the separation of the races in bus transportation.

In making the decision under discussion, the Supreme Court gave no reasons for its ruling. The Court had none. It overturned the customs and laws of a sovereign people without in any way stating why it did so. The decision denies to the States rights which for more than seventy-five years have been conceded to belong to the States by the court itself.

Without warrant of established law, without any authority from the Federal Constitution, the Supreme Court of the United States, setting aside all of its former decisions, which it declared to be the law of the land, embarks on an era of "court-law-making", a power which is not confided to the Supreme Court but expressly denied it, a power which belongs to Congress and the State Legislatures.

Evidently the Supreme Court is determined to destroy the last vestige of States' Rights and to centralize the law-making power relating purely to state and local matters in the Court itself at Washington.

#### [Supreme Court's Actions]

The Federal Supreme Court has of late years established itself as a "fourth department" of

government, a super-department over and above all other departments, not bound by the checks and balances of the Constitution, and knowing only the caprices, the whims, and the vagaries of the court itself as the supreme law.

The instant decision can find no support in American Constitutional law, none in reason, nor in common sense.

Perhaps it will be said that a lower court should not condemn the rulings of a higher court; but, if an offense comes out of the truth, it is better that the offense come than the truth be concealed.

The Supreme Court has spoken and declared the state law and the city ordinance null and void, and the motion to dissolve the temporary restraining order must be reluctantly granted. It is, therefore,

**ORDERED, ADJUDGED and DECREED  
By the Court:**

- 1) That the temporary restraining order heretofore issued in this cause be, and the same is hereby dissolved.
- 2) The Court cannot concur in the suggestion that the bill be dismissed, and the bill is hereby retained for such other or further action as can be had by due process of law.

## TRANSPORTATION Buses—Alabama

### The CITY OF MONTGOMERY, a municipal corporation v. MONTGOMERY IMPROVEMENT ASSOCIATION, et al.

Circuit Court, Montgomery County, Alabama, November 13, 1956, No. 31075.

**SUMMARY:** For several months Negroes in Montgomery, Alabama, have been conducting a "boycott" of the Montgomery City (Bus) Lines because of alleged discriminatory practices toward Negro passengers. Transportation of Negroes has been carried out through the operation of car pools, sponsored by the Montgomery Improvement Association and a number of churches and individuals. On October 30, 1956, the Montgomery City Board of Commissioners adopted a resolution<sup>a</sup> to halt the operation of the car pools. The following day a complaint was filed by the city in an Alabama state court seeking an injunction against the operation of car pools without having obtained a franchise or license, as a common carrier. The respondent car pool operators then filed a petition in federal district court seeking to

- a. That resolution states:  
"BE IT RESOLVED BY THE BOARD OF COMMISSIONS OF THE CITY OF MONTGOMERY, ALABAMA, as follows:
1. That the Legal Department of the City be and it is hereby instructed to file such proceedings as it may deem proper to stop the operation of car pools or transportation systems growing out of the bus boycott.
2. Such action by the Legal Department shall be under the direction supervision and control of the Mayor and of the Commissioner of Public Affairs.

enjoin the city from proceeding in the court action. The federal district court refused to issue such an injunction (see p. 126). On November 13, 1956, the state court issued a temporary injunction against the respondents. Set out below is the order of the court granting the temporary injunction, followed by the restraining order and the original petition of the city.

**CARTER, J.**

Temporary injunction granted and Register directed to issue restraining order against all defendants.

**[Restraining Order]**

**TO:** Montgomery Improvement Association, a corporation; Zion Hill Baptist Church, a corporation; Hutchinson Street Baptist Church, a corporation; Holt Street Baptist Church, a corporation; Hall Street Baptist Church, a corporation; Beaulah Baptist Church; Lilly Baptist Church; Bethel Baptist Church; Canon Hill Baptist Church; First Baptist Church; Mr. Gilead Baptist Church; Bryant Street Baptist Church; Shiloh Baptist Church; St. John A.M.E. Church; Dexter Avenue Baptist Church; Oak Street A.M.E. Zion Church; M. L. King, Jr.; Erna A. Dungee; E. D. Nixon; B. J. Simms; Hazel R. Gregory; Fletcher Smith; Mentha Johnson; H. H. Hubbard; H. J. Palmer; J. H. Cherry; B. M. Aver-

hart; A. H. Huffman; A. Murphy; S. P. McBride; W. J. Johnson; Matthew Kennedy; A. Sanders; Willie James Kemp; S. Heard; J. W. Hayes; R. J. Glasco; Thomas McCloud;

**WHEREAS**, The City of Montgomery, a municipal corporation, has exhibited its bill of complaint in equity, in the Circuit Court of Montgomery County, Alabama, and has obtained from the Honorable Eugene W. Carter, Judge of said Court, an order for the issuance of an injunction to enjoin you as hereinafter mentioned;

**NOW, THEREFORE**, you, and each of you, your agents, servants or employees, are hereby enjoined from operating of such a system, and this Injunction you are required to obey under the penalties of the law, until the further order of this Court.

Witness my hand, this the 14th day of November, 1956.

/s/ Geo. H. Jones, Jr.  
Register

## Complaint

**TO THE HONORABLE WALTER B. JONES,  
AND EUGENE W. CARTER, JUDGES, CIR-  
CUIT COURT OF MONTGOMERY COUNTY,  
ALABAMA, IN EQUITY:**

Now comes the City of Montgomery and shows unto this Honorable Court as follows:

1. The City of Montgomery is a municipal corporation organized and existing in the State of Alabama. Montgomery Improvement Association, is a corporation organized under the "Alabama Non-Profit Corporation Act", adopted in 1955; Zion Hill Baptist Church, a corporation; Hutchinson Street Baptist Church, a corporation; Holt Street Baptist Church, a corporation; Hall Street Baptist Church, a corporation; is each a church corporation, organized and existing in the State of Alabama; Beaulah Baptist Church; Lilly Baptist Church; Bethel Baptist Church; Canon Hill Baptist Church; First Baptist Church; Bryant

Street Baptist Church; Shiloh Baptist Church; St. John A.M.E. Church; Dexter Avenue Baptist Church; Oak Street A.M.E. Zion Church; is each an unincorporated church association existing in the State of Alabama; M. L. King, Jr.; Erna A. Dungee; E. D. Nixon; B. J. Simms; Hazel R. Gregory; Fletcher Smith; Clarence Moore; Mentha Johnson; H. H. Hubbard; H. J. Palmer; J. H. Cherry, B. M. Averhart; A. H. Huffman; A. Murphy; S. P. McBride; W. J. Johnson; Matthew Kennedy; A. Sanders; Willie James Kemp; Lewis Christburg; S. Heard; J. W. Hayes; R. J. Glasco; M. W. Richburg; J. C. Marcus; Thomas McCloud; W. Moss, is each a bona fide resident citizen of Montgomery County, Alabama, and each is over the age of twenty-one years.

2. Respondents are presently engaged in a private enterprise whereby they are operating a transportation system in the City of Montgomery,

Alabama. Such enterprise includes the operation of station wagons, automobiles and other motor vehicles to transport citizens over both regular and irregular routes in the City of Montgomery. Respondents have created or caused to be created terminal points and fixed routes within the system; they have purchased, hired, leased or let motor vehicles now employed in the transportation of passengers. They have employed and are paying drivers and dispatchers; they have spent large sums of money in the operation of their enterprise.

3. Respondents are using the streets of the City of Montgomery, Alabama, for the operation of a private enterprise without first obtaining the consent of the City of Montgomery in violation of the provisions of Article 12, Section 220, Constitution of Alabama; and in violation of the provisions of Title 10, Section 72, Code of Alabama of 1940, as amended.

4. Respondents are operating a transportation system in the City of Montgomery, Alabama, without payment of license fees as provided by law.

5. Respondents are operating said transportation system in the City of Montgomery, Alabama, without a franchise as provided by law.

6. The operation of said transportation system is illegal in that:

1. It is being operated without payment of license fees, and
2. It is being operated without a franchise and
3. It is being operated through the use of drivers who are not the holders of valid operating licenses.

7. The operation of said transportation system constitutes a public nuisance in that:

1. Said operation is illegal.
2. Said operation is being carried on without the consent of the City of Montgomery.
3. Said operation is being carried on without a franchise.
4. Said operation is being conducted without adequate financial or insurance protection to passengers and other users of the City streets.
5. Said operation is being conducted by hired drivers of motor vehicles who have not obtained a valid operators permit.
6. Said operation is being carried on through the use of employed drivers who are

not qualified morally and by experience to use the city streets in the transportation of passengers.

8. The operation of said transportation system is not needed in the City of Montgomery, Alabama; the City has granted a franchise and issued licenses for adequate public transportation within the City of Montgomery.

9. Respondents have caused complainant to lose \$15,000.00 in revenue by the operation of said transportation system without franchise and licenses.

10. It is to the best interest of the citizens of Montgomery that said enterprise and said transportation system be stopped.

WHEREFORE, THE PREMISES CONSIDERED, your petitioner prays that the said Montgomery Improvement Association, a corporation; Zion Hill Baptist Church, a corporation; Hutchinson Street Baptist Church, a corporation; Holt Street Baptist Church, a corporation; Hall Street Baptist Church, a corporation; Beaulah Baptist Church; Lilly Baptist Church; Bethel Baptist Church; Canon Hill Baptist Church; First Baptist Church; Mt. Gilead Baptist Church; Bryant Street Baptist Church; Shiloh Baptist Church; St. John A.M.E. Church; Dexter Avenue Baptist Church; Oak Street A.M.E. Zion Church; M. L. King, Jr.; Erna A. Dungee; E. D. Nixon; B. J. Simms; Hazel R. Gregory; Fletcher Smith; Clarence Moore; Mentha Johnson; H. H. Hubbard; H. J. Palmer; J. H. Cherry; B. M. Averhart; A. H. Juffman; A. Murphy; S. P. McBride; W. J. Johnson; Matthew Kennedy; A. Sanders; Willie James Kemp; Lewis Christburg; S. Heard; J. W. Hays; R. J. Glasco; M. W. Richburg; J. C. Marcus; Thomas McCloud; W. Moss; each be made party respondent to this its bill of complaint, and in order that petitioner may have the relief hereinafter prayed for, it prays that your Honors will order the State's Writ of subpoena to be issued, directed to each of the said Respondents, commanding them and each of them to plead, answer or demur to this its bill of complaint within the time required by law and the rules of this Honorable Court, and that upon hearing this Honorable Court will grant the following relief:

1. Order a temporary injunction restraining each of the Respondents and his, her or its agents, servants or employees from operating a transportation system in the City of Montgomery

or in taking any part in the operation of such a system;

2. Order a permanent injunction restraining each of the Respondents and his, her or its agents, servants or employees from operating a transportation system in the City of Montgomery or in taking any part in the operation of such a system.

3. Determine Complainant's loss resultant

from Respondent's operations and award Complainant appropriate compensatory damages.

4. Grant such other, further and general relief as in equity and good conscience Complainant may be entitled.

/s/ Walter J. Knabe  
Drayton N. Hamilton  
Attorneys for Complainant

## TRANSPORTATION Buses—Alabama

**Aurelia S. BROWDER et al. v. CITY OF MONTGOMERY, a municipal corporation, and W. A. Gayle, etc., individually and as the Board of Commissioners of the City of Montgomery.**

United States District Court, Middle District, Alabama, November 14, 1956. 146 F.Supp. 127.

**SUMMARY:** On the same day the bill for an injunction against the operation of car pools by Negroes in Montgomery, Alabama, was filed by the City of Montgomery (see p. 123) in an Alabama state court, a number of Negro citizens filed an action in federal district court seeking to enjoin the prosecution of any court action by the city against the car pool operators. The federal district court denied a motion by the city to dismiss the action on grounds of lack of jurisdiction. The court held that, although it had jurisdiction and authority to grant the relief requested, it would decline to do so under the circumstances presented.

LYNNE, District Judge

### ORDER

Petitioners, by motion and complaint filed November 1, 1956, seek to have this court issue an injunction restraining the City of Montgomery, its Board of Commissioners, servants, agents, employees, and attorneys from interfering with the operation of a transportation system or car pool operated within the City of Montgomery by petitioners and others similarly situated. The petition prays that the court enjoin the defendants from filing or prosecuting any action or proceeding in the municipal courts of the City of Montgomery or the Circuit Court of Montgomery County, Alabama, or any other court of the State of Alabama.

Petitioners by amendment filed this date (being the day set by this court for a hearing), seek to bring in new parties and make other allegations similar to those in the original complaint. The amendment except to add new parties, is allowed and otherwise is denied.

Defendants move to dismiss on the grounds

this court has no jurisdiction; that motion is hereby overruled and denied.

The jurisdiction of the court is invoked under Title 42, §§ 1981 and 1983, and Title 28, § 1343(3), § 1561 and § 2283, of the United States Code.

Section 1981, legislated by Congress to insure equal rights under the law to all persons, provides that:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1983 of Title 42, legislated to insure an adequate remedy to every person deprived of rights secured by the Constitution and laws of the United States under color of any State or local regulation, provides that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This court is not without authority to grant the relief prayed for if the circumstances are found to so justify. Title 28, § 1343 U.S.C., provides that:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The authority vested in the District Courts of the United States to exercise original jurisdiction in such cases is not revoked by the action of State courts in the enforcement of their asserted authorities. The Supreme Court in *Table's* case, 80 U.S. 397, held:

*"The government of the United States and the government of a State are distinct and independent of each other within their respective spheres of action, although existing and exercising their powers within the same territorial limits. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States."* (Emphasis added).

The court is of the opinion, however, that although vested with authority to grant the re-

lief prayed for by petitioners, the circumstances of this case do not justify the court's intervention.

#### [State Court Action]

The court takes judicial notice of the cause styled *The City of Montgomery*, a municipal corporation, vs. *Montgomery Improvement Association*, a corporation, and others, presently pending before the Circuit Court of Montgomery County, Alabama, in which cause the City of Montgomery seeks to enjoin the respondents from the further operation of a transportation system or car pool within the City of Montgomery and for other relief as more fully set out in the bill of complaint.

The State courts, as well as the Federal judiciary, are under a sworn duty to uphold the Constitution of the United States and the citizens' rights thereunder. Article VI, Clause 3 of the Constitution; 4 U.S.C.A. 101; *Charles T. Henderson, Jr., et al. v. United States*, 5th Cir., Sept. 26, 1956. This court will not presume that the courts of the State will not uphold this sworn obligation.

In accord with the principles of comity necessary for harmonious relations between the State and Federal judiciaries, courts of equity have always been hesitant to grant the extraordinary relief afforded by injunctive process; especially is this true where the relief sought would result in enjoining the enforcement of State criminal statutes and ordinances. While the Federal courts have the power to enjoin State officers from instituting criminal actions they will not do so except under extraordinary circumstances where the danger of irreparable injury is great and imminent. *Fenner v. Boykin*, 5th Cir., 3 F.2d 674, affirmed 271 U.S. 240, cited at 21 C.J.S. 838.

As expressed by Justice Cardozo in *Hawks v. Hamill*, 288 U.S. 52, cited in *Chapman v. Trustees of Delaware State College*, D.C. Del., 101 F.Supp. 441:

*"Caution and reluctance there must be in any case where there is the threat of opposition, in respect of local controversies, between state and federal courts. Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such*

circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' \* \* \* A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin."

The rules of comity to which Justice Cardozo referred are by no means exclusively binding upon Federal courts but are equally binding upon State courts and require of them that restraint be exercised to prevent a conflict of sovereigns when jurisdiction of the controversy has attached to the Federal courts.

The hesitancy of the Federal courts to enjoin the enforcement of criminal statutes and ordinances was expressed by the Fifth Circuit in its recent decision of *City of Houston, et al. v. Dobbs Co. of Dallas*, 232 F.2d 428, in which the court said:

"To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." \*

"We have said that it must appear that 'the danger of irreparable loss is both great and immediate'; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged."

In *Audiocasting, Inc. v. State of Louisiana*, D.C. La., 143 F.Supp. 922 (1956), the District Court of Louisiana held:

"\* \* \* that a Federal Court may not enjoin a State or its officers from instituting criminal actions under State laws, except when absolutely necessary for protection of constitutional rights. This may not be done except under extraordinary circumstances,

"\* \* \* where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The

accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court. \* \* \*"

—citing among other authorities *Douglas v. City of Jeannette*, 1943, 319 U.S. 157, and *City of Miami v. Sutton*, 5 Cir., 181 F.2d 644, 649.

In *Douglas v. City of Jeannette*, the petition seeking injunctive relief from threatened state criminal prosecutions was also founded on the Civil Rights Act. The Supreme Court, in upholding the Third Circuit's refusal to grant an injunction, said:

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds."

The court is of the opinion that the petitioners have not been threatened with any injury other than that incidental to the enforcement of city ordinances, or that this court by issuing the relief prayed for could afford petitioners protection which could not be secured by hearing in

the State court proceeding and an appeal to the United States Supreme Court.

In accord with this opinion and the authorities to which I have referred, it is the ORDER

and JUDGMENT of the court that the petition seeking a temporary injunction be and the same is hereby overruled and denied.

## TRANSPORTATION Buses—Florida

**Maggie GARMON et al. v. MIAMI TRANSIT COMPANY, Inc., et al.**

United States District Court, Southern District, Florida, January 4, 1957. Civ. No. 7210-M.

**SUMMARY:** Negroes in Miami, Florida, brought a class action in federal district court seeking a declaratory judgment and injunctive relief against the operator of city buses, the City of Miami and the city commissioners. The suit asked that city ordinances and state laws requiring racial segregation in transportation facilities be declared unconstitutional and void and that the defendants be restrained from requiring the plaintiffs and other Negroes similarly situated to occupy segregated seating on city buses. The city filed a "defensive motion" and the transit company filed a motion to dismiss. On a hearing of these motions the plaintiffs moved for the appointment of a three-judge court. The court denied this motion, stating that it had already been determined by the United States Supreme Court that such ordinances and statutes are unconstitutional and void. The court granted the motion to dismiss as to the transit company because the relief sought, a declaration of the unconstitutionality of the statutes and ordinances, could not be granted as against the company. The motion to dismiss as to the city was denied. Following the court's order the petition of the plaintiff and the motions to dismiss are reproduced.

## Order

CHOATE, District Judge.

This cause having come on to be heard on the third day of January, 1957, upon the motion to dismiss filed by the defendant, the Miami Transit Company, on November 2, 1956, and upon the motions to dismiss (styled "defensive motions") filed by the defendant, the City of Miami, Florida, on November 2, 1956, and the court having heard argument of counsel and being advised in the premises, the court is of the opinion that the defendant transit company's motion to dismiss should be granted and the city's motion to dismiss should be denied.

On November 13, 1956, the United States Supreme Court affirmed the judgment of the United States district court for the middle district of Alabama in the case of *Gayle v. Browder* (reported below as *Browder v. Gayle*, 142 F.Supp. 707 (M.D. Ala. 1956)). The Supreme Court's affirmation at 352 U.S. 903, reads as follows:

"Per Curiam: The motion to affirm is granted and the judgment is affirmed. *Brown v. Board of Education*, 347 U.S. 483; *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877; *Holmes v. Atlanta*, 350 U.S. 879."

In its opinion at 142 F.Supp. 707, the three-judge district court held, at page 717,

"... we hold that the statutes and ordinances requiring segregation of white and colored races on the motor buses of a common carrier of passengers in the city of Montgomery and its police jurisdiction violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States . . ."

### [Motion For Three-Judge Court]

In his opening remarks counsel for plaintiff, Maggie Garmon and others, requested that this

court rule on the necessity of convening a three-judge court pursuant to 28 U.S.C., Section 2281, et sequentia. Although this matter has not been presented in a procedurally proper manner this court sitting alone would have the ultimate authority to determine, as it does now, that a three-judge court might not be convened for the following reasons.

Counsel for the plaintiffs and for the defendant, the City of Miami, are in agreement that the unconstitutional city ordinances involved in the "Montgomery bus case" (*Browder v. Gayle, supra*) are in all substantial respects identical to the Miami city ordinances in the case at bar and with the statutory law involved. Because of the Supreme Court's decision in the "Montgomery bus case" there is no remaining substantial constitutional question in the present case, and, therefore, no necessity for the convening of a three-judge court. See *Board of Supervisors v. Tureaud*, 228 F.2d 895 (5th Cir. 1956), (cert. den. 351 U.S. 924 (1956)); *id.* 226 F.2d 714 (5th Cir. 1955); *id.* 225 F.2d 434, (5th Cir. 1955), (special concurring opinion at 225 F.2d at 446); *Bush v. Orleans Parish School Board*, 138 F.Supp. 336 (E.D. La. 1956); *Davis v. County School Board of Prince Edward County, Virginia*, 142 F.Supp. 616 (E.D. Va. 1956).

*[Transit Company Dismissed as Defendant]*

This court is further of the opinion that this suit was improperly brought against the Miami Transit Company for the reason that the ultimate relief sought herein is a declaration of the constitutionality of certain ordinances and state laws and an injunction against the en-

forcement of those ordinances and laws. That type of relief can be granted only against the proper legal public authorities responsible for the enforcement of those ordinances. The decisions of the Supreme Court in civil rights cases of all types and cases are directed to state (or city) officials acting in their official capacity and those decisions have not been directed to a private individual or private business firms and indeed there is no constitutional prohibition affecting the freedom of private businesses to regulate their business within the law, nor is there any constitutional authority to impose upon them the burden to either enforce or not to enforce segregation in their private affairs.

For the above reasons, it is,

**ORDERED AND ADJUDGED** that the plaintiffs' oral request for the convening of a three-judge court be and the same is hereby denied, and it is

**FURTHER ORDERED AND ADJUDGED** that the said motion to dismiss of the said Miami Transit Company be and the same is hereby granted, and it is

**FURTHER ORDERED AND ADJUDGED** that the said motions to dismiss of the defendant City of Miami (styled "defensive motion") be and the same are hereby denied and the defendant City of Miami is allowed ten days from the date of this order within which to answer or otherwise plead.

Done and ordered in chambers at Miami, Florida, this 4th day of January, 1957.

## Petition for Declaratory Judgment and Injunctive Relief

Come now the petitioners by their undersigned attorneys and respectfully represent unto the Court as follows:

1.

That the jurisdiction of this Court is invoked under Title 28, United States Code, Section 1343. That this is an action authorized by law to be brought to redress the deprivation under color of law, statute, regulation, custom, or usage of a state of rights, privileges, and immunities secured by the Constitution and Laws of the United States providing for equal rights

of citizens of the United States and of all persons within the jurisdiction of the United States, viz, Title 8, United States Code, Section 41 and 43.

2.

That the jurisdiction of this Court is also invoked under Title 28, United States Code, Section 2281, this being an action for an interlocutory and permanent injunction to restrain upon the grounds of unconstitutionality, the enforcement of provisions of the Statutes of the State of Florida and Ordinances of the City of Miami,

Florida by restraining the defendants from enforcing the same.

3.

That this is an action brought pursuant to Rule 23(a) (3) of the Federal Rules of Civil Procedure by the plaintiffs who are all members of the colored race for themselves individually and as representatives of a class of persons who are all residents of Dade County, Florida, who are members of the colored race, and who are also persons who have patronized the bus lines which are owned and operated by the defendant, the Miami Transit Co., Inc. upon the streets of the City of Miami, Florida and who intend to patronize and avail themselves of the facilities of the Miami Transit Co., Inc. in the future. That the members of the class which the plaintiffs represent are as numerous that it is impracticable to bring them all before the Court individually as parties plaintiff. That the plaintiffs and those they represent as a class all seek common relief based upon common questions of law and fact.

4.

That this proceeding is one for a declaratory judgment under Title 28, United States Code, Sections 2201 and 2202 for the purpose of having this Court declare the rights and legal relationships of the parties in a matter which is actually in controversy, to wit:

Whether the compliance with, execution of, and enforcement of the provisions of Chapter 55, Sections 248 and 250 of the Code of the City of Miami, Florida (copies of which are attached to this petition and are made a part hereof by reference) are denials of the equal protection of the laws of the plaintiffs and the class which they represent contrary to the Constitution and Laws of the United States of America.

and

Whether the compliance with, execution of, and enforcement by the defendants of Sections 352.05, 352.07, 352.11 and 352.14 Florida Statutes Annotated, 1941 (copies of which are attached to this complaint and which are made a part hereof by reference) which require the segregation of the white and colored races on common carriers in the City of Miami, Florida are a denial of rights, privileges, and immunities due the

petitioners as citizens of the United States under the Constitution and Laws of the United States of America.

5.

That the plaintiffs, Maggie Garmon, Eleanor M. Fair, Alice Jackson, and Gloria Matthews, all reside in Dade County, Florida. That each of them is colored and uses the bus system operated by the Miami Transit Co., Inc. and needs to use the said system in the future. That each of the plaintiffs is sui juris and above the age of twenty one years.

6.

That the defendant, the City of Miami, Florida, is a municipal corporation existing under the Laws of the State of Florida. That Otis Shiver, B. E. Hearn, Randall N. Christmas, and George Du Breuil and James W. High are the duly elected and qualified members of the Board of City Commissioners of the City of Miami, Florida. That the Miami Transit Company, Inc. is a corporation existing under the Laws of the State of Florida. That the said transportation company is engaged in the operation of bus lines for the transportation of passengers in the City of Miami, Florida under a franchise which was granted to it by the City of Miami, Florida.

7.

Plaintiffs further represent unto the Court that in providing public transportation in the City of Miami, Florida, that the Miami Transit Company, Inc. does so in conformity with Sections 352.05, 352.07, 352.11 and 352.14 of Florida Statutes Annotated, 1941, copies of which are attached hereto, which require all transportation companies operating in the state to segregate the white and colored races on all common carriers. That likewise under Sections 248 and 250 of Chapter 55 of the Code of the City of Miami, Florida, the Miami Transit Company, Inc. is required to segregate the white and colored races on its buses. That all of the aforementioned statutes and ordinances are in full force and effect and are being complied with and enforced by the Miami Transit Company. That the company, its officers, employees and agents are required by law to enforce the said statutes and ordinances and in doing so require white passengers to seat themselves from the front of its buses and colored passengers to seat

themselves from the rear of its buses. That by enforcing the said statutes and ordinances they not only act as officers and agents of the Miami Transit Company, Inc., a private corporation but also as state and city officials. That the segregation of white and colored passengers by the company and its agents on the buses thereof is an enforcement of an arbitrary rule, based solely upon the racial origin of the rider and is therefore a denial of the equal protection of the laws which is guaranteed by the Constitution and Laws of the United States.

## 9.

That the plaintiffs and others similarly situated who fail to observe the orders of the agents and employees of the Miami Transit Company, Inc. requiring the segregation of the white and colored races aforesaid are being subjected to arrest and confinement in jail and are threatened with arrest and confinement. Plaintiffs more specifically represent unto the Court as follows:

a. That on July 8, 1956 the plaintiff, Eleanor M. Fair, was a passenger on a bus operated by the Miami Transit Co., Inc. in the City of Miami, Florida and in the course of her ride was ordered by a driver of the bus to remove herself to the rear of the bus in accordance with city and state law. That the said Eleanor M. Fair refused to move to the rear of the bus and that thereupon the driver called a Miami policeman who advised her that she was violating the law by refusing to either get off of the bus or seat herself in the rear and that when she persisted in her refusal to move she was then and there placed under arrest and confined in the Miami City Jail.

b. That on October 3, 1956, the plaintiff, Maggie Garmon was a passenger on a bus operated by the Miami Transit Co., Inc. in Miami, Florida. That in the course of her ride, on said date Maggie Garmon was approached by a bus driver employed by the Miami Transit Co. and ordered to remove herself from her seat in the middle of the bus and to sit in the rear in accordance with city and state law. That she refused to do so and thereupon the driver called a policeman who required her to move to the rear of the bus or suffer the consequences of going to jail for her failure to do so.

c. That on October 11, 1956, the plaintiffs,

Gloria Matthews and Alice Jackson, were passengers on one of the buses operated by the Miami Transit Company, Inc. in the City of Miami, Florida. That they seated themselves in the front of the bus and were ordered to get up and seat themselves in the rear of the bus in accordance with city and state segregation laws.

## 10.

That the plaintiffs and others similarly situated suffer and are threatened with irreparable injury by reason of the acts complained of and have no plain, adequate or complete remedy to redress these wrongs herein complained of other than by this suit for declaratory and injunctive relief. That any other remedy sought by them would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits and would cause further irreparable injury, damage and inconvenience to the plaintiffs and those similarly situated.

WHEREFORE, Plaintiffs respectfully pray that:

1. The Court convene a Three Judge Court as provided for in Title 28, United States Code, Section 2284.
2. The Court advance this cause on the docket and order a speedy hearing on this petition.
3. That upon a hearing on the merits of this petition that the Court enjoin and restrain the defendants, and each of them, from executing or otherwise complying with Sections 352.05, 352.07, 352.11 and 352.14, Florida Statutes Annotated, 1941 and Sections 248 and 250 of the Code of the City of Miami, Florida, or by any custom, practice, or usage segregate the plaintiffs and the class they represent from other passengers on the buses operated by the Miami Transit Company, Inc. on the basis of their racial identity.
4. The Court enter its declaratory judgment and decree declaring that Sections 352.05, 352.07, 352.11 and 352.14, Florida Statutes Annotated, 1941 and Sections 248 and 250, Chapter 55 of the Code of the City of Miami, Florida to be unconstitutional because the same are inconsistent with the Fourteenth Amendment to the Constitution of the United States and Sections 1981 and 1983 of Title 42 of the United States Code.

5. The Court allow plaintiffs their costs and such other relief as may appear to the Court to be meet and proper.

And plaintiffs will ever pray.

G. E. Graves, Jr.  
802 N.W. Second Avenue  
Miami, Florida  
Edwin L. Davis  
941 N.W. Second Avenue  
Miami, Florida  
and  
F. Malcolm Cunningham  
500 Rosemary Avenue  
West Palm Beach, Florida  
Attorneys for Plaintiffs

white or negro passengers. *Section 352.11, Florida Statutes Annotated, 1941*

Any passenger belonging to the one race who willfully occupies or attempts to occupy any such car, or division thereof, provided for passengers of the other race, or who occupying such car or division thereof, refuses to leave the same when requested so to do by the conductor or other person in charge of such car, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not exceeding fifty dollars, or by imprisonment in the county jail for not exceeding three months. The conductor or other person in charge of such car is vested with full power and authority to arrest such passenger and to eject him or her from the car. *Section 352.14, Florida Statutes Annotated, 1941*

All persons operating buses in the city shall provide equal and separate accommodations for white and colored passengers. All white passengers shall use only the buses or portions of buses provided for white passengers, and colored passengers shall use only the buses or portions of buses provided for colored passengers. This rule shall apply to standing passengers and seated passengers. (*Ord. 2574, Section 247. Oct. 21, 1941, Section 248, Chapter 55, Code of the City of Miami, Florida*)

It shall be unlawful for any driver, operator or conductor, while on duty in any public conveyance, with a seating capacity of ten or more passengers, used at the time for transporting passengers for compensation in this city, to fail, neglect or refuse to enforce the provisions of sections 248 and 249 of this division of this chapter and other provisions applicable to the conduct of passengers thereon, and in order to assist in the enforcement of said provisions of this chapter applicable to such conveyance, such driver, operator or conductor shall be vested with police authority in this city, (*Ord. 2574, Section 249 Oct. 21, 1941. Section 250, Chapter 55, Code of the City of Miami, Florida*).

## EXHIBIT "A"

Any white person unlawfully and willfully occupying, as a passenger, any car or part of car not so set apart and provided for white passengers, and any colored passenger unlawfully and willfully occupying, as a passenger, any car or part of car not so set apart and provided for colored passengers, shall, upon conviction, be punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding six months. Nothing in this section shall apply to persons lawfully in charge of or under the charge of persons of the other race. *Section 352.05 Florida Statutes Annotated, 1941*

All persons operating urban and suburban (or either) electric cars as common carriers of passengers in this state, shall furnish equal but separate accommodations for white and negro passengers on all cars so operated. *Section 352.07, Florida Statutes Annotated, 1941*

Sections 352.07-352.15 shall not be so construed as to prevent the running of special or extra cars, in addition to the regular schedule cars, for the exclusive accommodation of either

## Defensive Motion

Comes now the CITY OF MIAMI, by and through its undersigned attorneys and files its Defensive Motions to the Petition for Declaratory Judgment and Injunctive Relief as filed herein and thereupon moves the Court as follows:

1. To dismiss petitioners' petition because it fails to state a claim upon which relief can be granted.
2. To dismiss petitioners' petition because it is without equity.
3. To dismiss petitioners' petition because the

Court lacks jurisdiction over the subject matter thereof.

4. To dismiss petitioners' petition because the Court lacks jurisdiction over the parties hereto.

5. To dismiss petitioners' petition because it affirmatively appears that no demand has been made upon the proper city officials of the City of Miami, Florida for the relief prayed for by the petitioners.

6. To dismiss petitioners' petition because it affirmatively appears that the petitioners have not exhausted their administrative remedies.

7. To dismiss petitioners' petition because petitioners fail to join indispensable parties defendants.

8. To dismiss petitioners' petition because the

petitioners fail to allege facts necessary to provide this Court with the jurisdiction over the persons of these defendants.

9. To dismiss petitioners' petition because petition fails to allege facts necessary to provide this Court with jurisdiction over the subject matter of this cause.

10. To dismiss petitioners' petition because of insufficiency of process.

11. To dismiss petitioners' petition because of insufficiency of service of process.

OLAVI M. HENDRICKSON,  
CITY ATTORNEY  
Attorney for Defendant,  
CITY OF MIAMI

## Motion to Dismiss

COMES NOW the Defendant, MIAMI TRANSIT COMPANY, a Florida corporation, by and through its undersigned attorneys, and moves the Court to dismiss the Petition heretofore filed in this cause and as grounds for such dismissal assigns the following:

1. Said Petition fails to state a claim upon which relief can be granted.

2. It affirmatively appears in and by the Petition or Complaint filed in this cause that this Defendant is engaged in the operation of transportation of passengers for hire in the City of Miami, under and by virtue of a franchise granted to it by the City of Miami, Florida, and is thereby compelled to operate its buses in accordance with all of the laws, rules and regulations of the City of Miami, Florida.

3. It affirmatively appears, and is so stated in the Petition, that this Defendant is operating its transportation system in conformity with Sections 352.05, 352.07, 352.11 and 352.14 of Florida Statutes Annotated, 1941, and Sections 248 and 250, of Chapter 55, of the Code of the City of Miami, Florida, and said petitioners thereby admit that this Defendant is required to conform to and abide by such rules and regulations as long as they are in force and effect.

4. It affirmatively appears in and by the said Petition that the laws, rules, ordinances and regulations of which the petitioners complain and which are being complied with and enforced by this Defendant are in full force and effect.

5. It affirmatively appears by the Petition that the only complaint against this Defendant is that it is complying with statutes and ordinances which are in full force and effect and with which this Defendant is compelled to comply.

6. It affirmatively appears by the Petition, and the laws and ordinances mentioned and referred to therein, that if this Defendant did not comply with the same it would not only be criminally liable, but that its property rights in and to its franchise would be placed in jeopardy, if not destroyed.

7. It affirmatively appears by the Petition, and laws and ordinances mentioned therein, that this Defendant is an improper party Defendant to this cause of action.

8. It affirmatively appears by the Petition that this Defendant is violating no law or doing any act for which it can be enjoined.

9. It affirmatively appears by the Petition that this Defendant is doing all of those things which it is admittedly required to do by the laws and ordinances in full force and effect and that it must continue to abide by such laws and rules and regulations as long as such are in full force and effect.

10. It affirmatively appears in and by the Petition that this is an improper type of action and is not one for declaratory judgment or decree.

11. The Petition contains conclusions of the pleader.

12. It fails to appear in and by the Petition that this Defendant has in any way deprived pe-

tioners of any right, privilege or immunity secured by the Constitution and laws of the United States.

13. It fails to appear from the Petition that this Defendant has denied in any manner the

petitioners of equal rights of citizens of the United States.

WHEREFORE, This Defendant respectfully requests that the said Petition be dismissed against this Defendant.

## TRANSPORTATION Buses—Florida

**CITY OF TALLAHASSEE, a municipal corporation, v. CITIES TRANSIT, INC., a Florida Corporation.**

In the Circuit Court, 2d Judicial Circuit, Leon County, Florida, No. 15137.

**SUMMARY:** Following the affirmance by the United States Supreme Court of a three-judge federal district court's holding that state statutes and city ordinances requiring racial segregation on public transportation facilities in Montgomery, Alabama, are unconstitutional (see 1 Race Rel. L. Rep. 1023) the operator of city buses in Tallahassee, Florida, ceased to require compliance with similar statutes in Florida. On December 26, 1956, city officials of Tallahassee notified the bus company that non-compliance with the segregation statutes would result in revocation of the company's franchise.<sup>a</sup> On the same day the city filed suit in a Florida state court to enjoin the company from failing to enforce the segregation statutes and to revoke the franchise upon further refusal. The following day the bus company obtained a temporary restraining order in federal district court against interference by city officials with its operations under its franchise, *infra*, p. 137. The complaint filed by the city in the state court follows:

## Complaint

The City of Tallahassee, a municipal corporation of the State of Florida in Leon County, brings this complaint against Cities Transit, Inc., a Florida Corporation, doing business in

a. That notice, in the form of a letter, stated:

December 26, 1956

Mr. J. S. D. Coleman, President  
Cities Transit Co., Inc.  
430 E. Gaines Street  
Tallahassee, Florida

Dear Sir:

This letter will serve as a confirmation of the advice and direction given to Cities Transit Co., Inc., on December 24, 1956, viz., that the City Commission directed me as City Manager to advise and notify Cities Transit Co., Inc., that the City of Tallahassee expects Cities Transit Co., Inc., to comply with Section 4 of the franchise under which the bus company is operating a bus transportation system in the City of Tallahassee, which Section 4 provides as follows:

### Section IV.

#### SEPARATION OF THE RACES

The company shall make and enforce reasonable rules and regulations providing for the

the City of Tallahassee, Leon County, Florida, and alleges:

1. That on the 13th day of February 1940, the City Commission of the City of Tallahassee

segregation of the human races when more than one race is transported on the same bus."

Failure to abide by the above quoted provision of the franchise ordinance would subject the franchise of the Company to forfeiture under the provisions of Section XIX of the Franchise ordinance, and Cities Transit Co., Inc., is hereby notified pursuant to said Section 19 of the intention of the City Commission to exercise the option to declare the said authority and privilege granted to the Company pursuant to said franchise ordinance forfeited upon the failure and refusal of the Company to comply with the provisions of said Section 4, which requires the Company to make and enforce reasonable rules and regulations providing for the segregation of the human races when more than one race is transported on the same bus.

Very truly yours,  
Arvah B. Hopkins  
City Manager.

passed Ordinance No. 368, being an Ordinance granting to Florida Associates Inc., the authority, right and privilege to establish, maintain and operate a bus transportation system in the City of Tallahassee, Florida, for the transportation for hire of passengers, and fixing the terms and conditions of such grant, a copy of said Ordinance being attached hereto as Exhibit A and by reference made a part hereof. Said Ordinance provides among other terms and conditions:

**"SECTION IV.**  
**Separation of Races.**

"The Company shall make and enforce reasonable rules and regulations providing for the segregation of the human races when more than one race is transported on the same bus."

2. On the 10th day of March, A.D. 1953, the City Commission of the City of Tallahassee passed Ordinance No. 659, being an Ordinance:

**"AMENDING SECTION II OF THAT CERTAIN ORDINANCE ENTITLED 'AN ORDINANCE GRANTING TO FLORIDA ASSOCIATES, INC., A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, THE AUTHORITY, RIGHT AND PRIVILEGE TO ESTABLISH, MAINTAIN AND OPERATE A BUS TRANSPORTATION SYSTEM IN THE CITY OF TALLAHASSEE, FLORIDA, FOR THE TRANSPORTATION FOR HIRE OF PASSENGERS AND FIXING THE TERMS AND CONDITIONS OF SUCH GRANT.' PASSED AND ADOPTED BY THE CITY COMMISSION ON THE 13th DAY OF FEBRUARY, A.D. 1940, BY GRANTING TO CITIES TRANSIT, INC., A FRANCHISE TO OPERATE A BUS TRANSPORTATION SYSTEM IN THE CITY OF TALLAHASSEE, FOR THE TRANSPORTATION FOR HIRE OF PASSENGERS FOR A TERM OF TWENTY YEARS COMMENCING ON THE EFFECTIVE DATE OF THIS ORDINANCE."**

That said Ordinance provides:

**"NATURE OF GRANT**

"The authority, right and privilege is hereby granted to Cities Transit, Inc., a corporation

organized and existing under the laws of the State of Florida, as successor to Florida Associates, Inc., for and in consideration of, and subject to, the conditions, agreements and privileges hereinafter set forth, to establish, maintain and operate over and upon the streets of the City of Tallahassee, Florida, a motor bus transportation system for the transportation of passengers for hire for a period of twenty (20) years, commencing on the 1st. day of May, A.D. 1953."

A copy of said Ordinance is attached hereto as Exhibit B and by reference made a part hereof.

3. In the year 1956, during the month of December thereof, the defendant Cities Transit, Inc., failed and refused to comply with Section IV. of Ordinance No. 368, and has failed and refused to enforce reasonable rules and regulations providing for the segregation of the human races when more than one race is transported on the same bus, and contrary to the said section has permitted the integration of the human races when more than one race is transported on the same bus, permitting the human races to mix and mingle and to sit indiscriminately on its said buses on a first come first served basis.

4. That on December 26, 1956, the plaintiff, acting by and through its City Manager, Arvah B. Hopkins, notified the defendant, pursuant to Section XIX., of Ordinance 368, that it had elected to exercise its option to declare the franchise, authority and privilege granted to the defendant forfeited upon the failure and refusal of the defendant to comply with Section IV. of Ordinance 368, as aforesaid, a copy of said letter being attached hereto as Exhibit C and by reference made a part hereof.

5. That the said failure and refusal of the company to comply with the said terms and conditions of said ordinance is a clear breach of its franchise and will, if these practices are continued, cause serious civil strife, and it will be impossible for the plaintiff to maintain order and prevent civil strife on the buses so integrated.

6. The actions of the defendant, as aforesaid, are causing and unless restrained, will continue to cause irreparable injury to the plaintiff and to the people of the City of Tallahassee, Florida.

WHEREFORE, the plaintiff prays:

(a) That the defendant, its agents, servants

and employees and each and every of them, be perpetually enjoined and restrained from operating each and every of its buses in violation of Section IV., of Ordinance No. 368, or in violation of any of the terms and conditions contained in said Ordinance.

(b) Upon the failure or refusal of the defendant to comply with the terms of Section IV., of Ordinance 368, for thirty (30) days from and after the 26th day of December, 1956, the date of the notice of the City as to the exercise of its option to forfeit the franchise granted by

Ordinance No. 368, and Ordinance No. 659, that this Honorable Court decree the said franchise so granted be forfeited and held null and void and of no effect.

Caldwell, Parker, Foster &  
Wigginton  
Brock Building  
Tallahassee, Florida  
By  
Leo L. Foster  
Attorneys for Plaintiff

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## TRANSPORTATION Buses—Florida

### CITIES TRANSIT, INC., a corporation v. CITY OF TALLAHASSEE, a municipal corporation, et al.

United States District Court, Northern District, Florida, December 27, 1956, Civ. No. 590.

**SUMMARY:** Following the filing of the above suit by the City of Tallahassee against the company operating buses in the city seeking to require the company to enforce racial segregation on its buses or have its franchise revoked, the company filed an action in federal district court to enjoin further action by the city toward the revocation of the franchise. The court, after hearing, granted a temporary restraining order. Following the order of the court, the complaint of the bus company is set out.

DEVANE, District Judge.

## Temporary Restraining Order

This cause came on for hearing this day, upon the sworn Complaint of the Plaintiff, after due notice, and the Court, having heard argument of counsel for the Plaintiff and the Defendants and having considered said sworn Complaint and the testimony adduced by the Plaintiff, finds an irreparable damage and injury will result to Plaintiff if this Order is not granted, viz: The Plaintiff has an investment of approximately Eighty Thousand Dollars (\$80,000.00) in bus equipment and facilities devoted to the use of its bus transportation system in the City of Tallahassee, and the continued operation of Plaintiff's buses is necessary to the end that Plaintiff may derive revenue therefrom to meet its obligations under its franchise with said City and in order to avoid a loss of revenue; that as a result of a recent boycott of its operations, the daily

revenue of the Plaintiff from its operations was reduced from approximately FIVE HUNDRED FIFTY DOLLARS (\$550.00) per day at the beginning of said boycott to approximately ONE HUNDRED EIGHTY DOLLARS (\$180.00) per day; that when such revenue declined to approximately ONE HUNDRED EIGHTY DOLLARS (\$180.00) per day, the City Commission of the City of Tallahassee authorized the Plaintiff to discontinue its operations; that thereafter such operations were resumed, following a one-month period of non-operation, and at the time of such resumption, the revenue of the Plaintiff dropped to approximately ONE HUNDRED SEVENTEEN DOLLARS (\$117.00) per day; that since such resumption, the revenue has gradually built up to where it is at this time approximately THREE HUNDRED DOLLARS

(\$300.00) per day; that it is apparent that a further suspension of operations will result in a further loss of patronage in the event of a subsequent resumption of operations and a still further reduction in the daily revenue of the Plaintiff from such operations, which, under said franchise, are authorized for a period of twenty (20) years, commencing on May 1, 1953; that it is apparent from the foregoing that it is essential to issue this Order for the further purpose of preserving the status quo until the several questions raised by the Complaint can, after hearing or hearings, be disposed of by the Court; and the Court being fully advised in the premises.

It is thereupon ORDERED, ADJUDGED AND DECREED that the CITY OF TALLAHASSEE, FLORIDA, a municipal corporation; JOHN Y. HUMPHRESS, Mayor-Commissioner,

J. W. CORDELL, Commissioner, H. C. SUMMITT, Commissioner, WILLIAM T. MAYO, Commissioner, and DAVIS H. ATKINSON, Commissioner, individually, and as members of and constituting the City Commission of the City of Tallahassee, Florida; and ARVAH B. HOPKINS, individually, and as City Manager of the City of Tallahassee, Florida; and FRANK STOUTAMIRE, individually, and as Chief of Police of the City of Tallahassee, Florida, their officers, employees and agents, be, and they are hereby, restrained until the further Order of the Court from interfering with the Plaintiff in its operations under its franchise with the City of Tallahassee.

DONE and ORDERED at Tallahassee, Florida, this the 27th day of December, 1956.

## Complaint

CITIES TRANSIT, INC. brings this Complaint against John Y. Humphress, Mayor-Commissioner, J. W. Cordell, Commissioner, H. C. Summitt, Commissioner, William T. Mayo, Commissioner, and Davis H. Atkinson, Commissioner, individually, and as members of and constituting the City Commission of the City of Tallahassee, Florida; and Arvah B. Hopkins, individually, and as City Manager of the City of Tallahassee, Florida; and Frank Stoutamire, individually, and as Chief of Police of the City of Tallahassee, Florida, and for its Complaint says:

### 1. JURISDICTIONAL ALLEGATIONS

This action is one seeking a declaration of the rights of the Plaintiff under certain statutes of the State of Florida, and an ordinance of the City of Tallahassee, Florida, and an exclusive Franchise issued to Plaintiff by the City of Tallahassee, Florida, granting to the Plaintiff the authority, right and privilege to establish, maintain and operate a bus transportation system in the City of Tallahassee, Florida, and providing in said Franchise that the Plaintiff shall make and enforce reasonable rules and regulations providing for the segregation of the human races when more than one race is transported on the same bus of Plaintiff, and declaring whether or not Plaintiff is being deprived of its property without due process of law and denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; and to enjoin and restrain

Defendants from interfering with Plaintiff in the lawful operation of its buses under said Franchise. This action is brought under the provisions of Title 28, United States Code, Sections 1331, 1343(3), 2201 and 2202.

### 2. PLAINTIFF

Cities Transit, Inc. is a corporation organizing and existing under the laws of the State of Florida (hereinafter sometimes called "Plaintiff"), which has been granted by Ordinances No. 388 and No. 659 of the City of Tallahassee, adopted by the City Commission of said City on February 13, 1940 and March 10, 1953, respectively, both of which said ordinances are presently in effect and operative, the authority, right and privilege to establish, maintain and operate a bus transportation system in the City of Tallahassee, Florida, for the transportation of passengers for hire and the Plaintiff has so established and is now maintaining and operating such a bus transportation system. Plaintiff's principal office is in the City of Tallahassee, Florida.

### 3. DEFENDANTS

The City of Tallahassee, Florida (hereinafter sometimes called the "City"), is made a Defendant herein because of the Franchise here involved, which was granted by the City to the Plaintiff and because of the powers of the City, as alleged in more detail hereinafter.

The Defendants John Y. Humphress, Mayor-

Commissioner, J. W. Cordell, Commissioner, H. C. Summitt, Commissioner, William T. Mayo, Commissioner, and Davis H. Atkinson, Commissioner, as members of and constituting the City Commission of the City of Tallahassee, Florida (hereinafter sometimes called the "City Commission"), are made Defendants herein by virtue of Section 10 of the Charter of the City, by which all powers of the City, except certain powers otherwise provided by said Charter and referred to hereinafter where pertinent, or by the Constitution of the State of Florida, are thereby vested in the City Commission; and, except as otherwise provided by said Charter (and not pertinent here), or by the Constitution of the State of Florida, the City Commission may by ordinance or resolution prescribe the manner in which any power of the City may be exercised.

The Defendant Arvah B. Hopkins, as City Manager of the City (hereinafter sometimes called "City Manager"), is made a Defendant herein because by Section 27 of the Charter of the City, such City Manager is empowered, under his responsibility to the City Commission for the proper administration of all affairs of the City, to see that all laws and ordinances of said City are enforced and to see that all terms and conditions imposed "in favor of the City or its inhabitants" in any public utility franchise are faithfully kept and performed.

The Defendant Frank Stoutamire, as Chief of Police of the City, is made a defendant herein by reason of Section 41 of the Charter of the City, which provides, among other things, that the Chief of Police shall execute the commands of the City Commission.

The Defendants John Y. Humphress, J. W. Cordell, H. C. Summitt, William T. Mayo, Davis H. Atkinson, Arvah B. Hopkins and Frank Stoutamire have been made Defendants herein individually because said Defendants have exceeded their powers, rights and authority as City Commissioners, City Manager and Chief of Police, respectively, in the action taken by them as hereinafter alleged, and as such individuals are liable in damages to Plaintiff as more specifically charged hereinafter.

#### 4. PURPOSE OF ACTION

The purpose of this action is to obtain a declaration of the rights of the Plaintiff under its aforesaid Franchise, requiring that the Plaintiff make and enforce reasonable rules and regu-

lations providing for the segregation of the human races when more than one race is transported on the same bus; to enjoin and restrain the City Commission, City Manager and Chief of Police, and the aforesaid members of said Commission and the City Manager and Chief of Police, individually, from interfering with Plaintiff in its operations in the transportation of passengers by bus in the City of Tallahassee, Florida, under its Franchise, as aforesaid; and to seek damages from said individual Defendants resulting from the matters and things more specifically alleged hereinafter.

#### 5. CONTROVERSY BETWEEN PLAINTIFF AND DEFENDANTS

(a) The State of Florida, through the enactment of Chapter 21581, Special Laws of Florida, Acts of 1941, conferred authority upon the City Commission to regulate the transportation of persons and property for hire and to grant to any person, persons, firm or corporation an exclusive Franchise for the use of the streets of such City for the operation of an auto bus transportation system, subject to the terms and restrictions of said chapter and of the lawful ordinances of said City to be enacted in accordance therewith. Said Chapter 21581 provided that the action of the City Commission theretofore granting any Franchise for the operation of an automobile bus transportation system in said City was thereby ratified and confirmed, thus ratifying and confirming the Franchise of the Plaintiff for the operation of an automobile bus transportation system in said City, as aforesaid. It is further provided by said Chapter 21581 that any Franchise granted by said City under the provisions of said Chapter 21581 shall contain a clause requiring the owner or owners of such Franchise at all times to abide by all reasonable regulations that may be imposed by said City Commission.

(b) The State of Florida, by Chapter 23549, Special Laws of Florida, Acts of 1945, defined the powers of the City to include, among other things, the powers

" . . . ; to adopt and enforce local police, sanitary and other similar regulations not in conflict with the Laws of the State of Florida; . . . to do whatever is necessary and proper for the safety, health, convenience, and general welfare of its inhabitants; and to exercise all powers of local self-gov-

ernment; . . . The enumeration of particular powers by this charter shall not be deemed to be held to be exclusive, but in addition to the powers hereby expressly granted, and those implied therefrom, or appropriate to the exercise thereof, the said City shall have, may exercise, all other powers which, under the Constitution and Laws of Florida, it would be competent and appropriate for this paragraph to specifically enumerate."

(c) On February 13, 1940, the City Commission, as aforesaid, adopted Ordinance No. 368 and thereby granted to Florida Associates, Inc., a predecessor of the Plaintiff Cities Transit, Inc., an exclusive Franchise and the authority, right and privilege to establish, maintain and operate a bus transportation system in the City for the transportation of passengers for hire. A copy of said Ordinance is attached hereto and made a part hereof as Exhibit "A".

(d) On March 10, 1953, the City Commission adopted Ordinance No. 659, as aforesaid, and thereby amended the aforesaid Ordinance No. 368 and by such amendment said exclusive Franchise of Florida Associates, Inc. became the exclusive Franchise of the Plaintiff, Cities Transit, Inc., and carried with it the authority, right and privilege to establish, maintain and operate a bus transportation system in the City of Tallahassee, Florida, for the transportation of passengers for hire, and the Plaintiff, Cities Transit, Inc., has been and is now engaged in the operation of a bus transportation system in the City of Tallahassee, pursuant to said Franchise. A copy of said Ordinance is attached hereto and made a part hereof as Exhibit "B".

(e) Section IV of said Franchise provides that:

**"SECTION IV.  
"Separation of Races.**

"The Company shall make and enforce reasonable rules and regulations providing for the segregation of the human races when more than one race is transported on the same bus."

(f) Section XIX of said Franchise contains provisions for forfeiture and reads as follows:

**"SECTION XIX.  
"Forfeitures.**

"The authority and privileges granted here-

under shall at the option of the City be subject to forfeiture upon the failure and refusal of the Company to comply with any of the terms hereof provided that the City shall give to the Company not less than thirty (30) days notice of its intention to exercise its said option, such notice to specify the default complained of during which time the Company shall be allowed to correct such default, in which event no forfeiture may be declared. Provided, however, that the Company shall at the time of the commencement of its operations hereunder and continuously during such operations comply with the provisions of Section 16 of this ordinance with reference to the carrying and maintenance of insurance or a surety bond against public liability and property damage or, with the consent of the City Commission of the City, act as a self-insurer against such hazards, and any failure to comply with the provisions of Section 16 shall authorize the City to declare the authority and privileges granted hereunder subject to forfeiture upon the City giving to the Company not less than ten (10) days notice of the intention to declare this franchise and the authority and privileges granted hereunder forfeited."

(g) On December 26, 1956, the City Commission directed its City Manager, and its City Manager by said direction advised and notified the Plaintiff by letter, a copy of which is attached hereto and made a part hereof as Exhibit "C", that the City expects the Plaintiff to comply with said Section IV of the Franchise quoted above, and asserted in said letter that failure to abide by said quoted provision of Section IV of said Franchise ordinance would subject Franchise of the Plaintiff to forfeiture under the provisions of Section XIX of said Franchise, as quoted above. By said letter Plaintiff was also notified pursuant to said Section XIX of the intention of the City Commission to exercise the option to declare said authority and privilege granted to Plaintiff pursuant to said Franchise ordinance forfeited for failure and refusal of the Plaintiff to comply with the provisions of said Section IV. Said letter did not specify the default complained of as required by said Section XIX.

(h) Later on the same day, that is, December 26, 1956, the City Commission by letter

from the City Manager, a copy of which is attached hereto and made a part hereof as Exhibit "D", ordered and directed Plaintiff to suspend its bus operations in the City immediately, without, however, specifying any cause for the suspension of such bus operations.

(i) Neither the Plaintiff nor any of its officers or employees, including its bus drivers, has any police power or other right, power or authority to enforce the provisions of said Section IV, and, if any such power, right or authority exists, it is in the City and the City's police officers, including, among others, the Defendant Chief of Police. Nevertheless, the City Commission has, as aforesaid, directed Plaintiff to enforce segregation of the human races in keeping with the provisions of said Section IV of said Franchise under penalty of forfeiture of the Plaintiff's rights under said Franchise, as provided by Section XIX thereof, and the City Commission contends and insists that said Section IV and the provisions thereof are valid and enforceable by the Plaintiff. Obviously, the City Commission has not adhered to the provisions of said Section XIX with respect to forfeiture, in that said City Commission has not specified any particular default by Plaintiff, yet the City Commission threatens forfeiture in the first said letter of December 26, in the event of failure and refusal of the Plaintiff to abide by the above quoted provision of said Section IV, and in the second letter of December 26, without specifying any reason therefor, the City Commission has directed Plaintiff to suspend its bus operations immediately.

(j) On the other hand, the United States District Court for the Middle District of Alabama, Northern Division, in Browder v. Gayle, 142 F.Supp. 707, held that a statute of the State of Alabama and an ordinance of the City of Montgomery, Alabama, as therein cited, requiring segregation of white and colored races on motor buses of the Montgomery City Lines, Inc., a common carrier of passengers in said City of Montgomery, and its police jurisdiction, and where said Montgomery City Lines, Inc. had operated and continued to operate its buses as provided by said statutes and ordinances requiring it to provide equal but separate accommodations for the white and colored races, violated the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States. In Gayle

v. Browder and Owen v. Browder, decided November 13, 1956, the Supreme Court of the United States granted a motion to affirm and affirmed the judgment of the District Court in Browder v. Gayle, *supra*, on the authority of Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, and other cases therein cited. See 1 L.Ed.2d 114, Advance Sheet No. 2.

(k) The Plaintiff has an investment of approximately \$80,000.00 in bus equipment and facilities devoted to use of its bus transportation system in the City and the continued operation of Plaintiff's buses is necessary to the end that the Plaintiff may derive revenue therefrom to meet the obligation under its Franchise to conduct bus operations in the City and in order to avoid loss in revenue and consequent damages to Plaintiff which will follow in the event such operations should be discontinued as directed by the City. In May of 1956 a segment of the colored race in the City organized an economic boycott against the Plaintiff and declined to use Plaintiff's buses because of the declination of the Plaintiff to ignore the provisions of Section IV of its Franchise. As a result of such boycott the daily revenue of the Plaintiff from its said bus operation was reduced from approximately \$550.00 per day at the beginning of the boycott to approximately \$180.00. When such revenue declined to the later figure the City Commission authorized the Plaintiff to discontinue its said operations. Said operations were resumed after a one month period without any such operations and at the time of such resumption and since the revenue has dropped to approximately \$117.00 per day. A further suspension of operations would result in a further loss of patronage in the event of subsequent resumption of service and would further reduce the daily revenue of the Plaintiff for such operations, which under said Franchise are authorized for a period of twenty years commencing on May 1, 1953. Plaintiff desires to conduct its operations legally and to abide by all lawful ordinances and requirements of the City Commission. Plaintiff has endeavored to do this, but there is now a clear doubt as to whether or not, in view of the foregoing and the further actions of the Defendants as hereinafter alleged, the provisions of said Section IV of the Franchise are reasonable as well as doubt as to their validity and enforceability. If Gayle v. Browder and Owen v. Browder, *supra*, are applicable to said

Section IV, then and in that event said Section IV is invalid and unenforceable. But despite these doubts the City Commission has taken the action aforesaid with the threat of forfeiture of Plaintiff's said Franchise. Said demands by the City Commission with, if acceded to by Plaintiff, result in the deprivation of Plaintiff's property without due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(l) Moreover, that the enforcement of said forfeiture, or the suspension of Plaintiff's operations, as aforesaid, will result in a deprivation, under color of the aforesaid statutes of the State of Florida and ordinances of the City of Tallahassee, of the right and privilege secured to Plaintiff by the Fourteenth Amendment to the Constitution of the United States to continue operation of its automobile buses in said City, pursuant to its aforesaid Franchise, despite said provisions of said Section IV of said Franchise, all in violation of Title 28, United States Code, Section 1343 (3) and 1981.

(m) Further, if the Plaintiff continues to operate under its said Franchise and endeavors, pursuant to the provisions of Section IV of said Franchise, as aforesaid, to enforce said provisions as to the segregation of the human races when more than one race is transported on the same bus, by requiring colored people to sit to the rear of the bus only, white people sit to the front of the bus only, then and in that event Plaintiff will be subjecting itself to possible suits against it by such colored people to redress the deprivation, under color of said statutes of the State of Florida and ordinances of the City of Tallahassee, of a claimed right and privilege of said colored people claimed by them to be secured to them by said Fourteenth Amendment and said Title 28, United States Code, Sections 1343 (3) and 1981.

(n) In view of the insistence of the City Commission that the Plaintiff suspend operations, as aforesaid, and the implication from the decision in *Gayle v. Browder* and *Owen v. Browder*, as aforesaid, that the provision of Section IV of Plaintiff's Franchise is invalid, and the other matters and things set forth above, an actual controversy exists between Plaintiff and Defendants and the Plaintiff being uncertain as

to its rights, hereby seeks a declaration thereof from this Court.

(o) Plaintiff, as aforesaid, cannot suspend operations without consequent heavy financial damage and loss and the Plaintiff, in keeping with the possible applicability of the aforesaid decisions of the Supreme Court of the United States, has informed the City that it intends to continue its operation of buses, at least until such time as it can obtain from this Court a declaration of its rights in the premises.

(p) After the City Commission learned of the Plaintiff's intention to continue operations as aforesaid, the Chief of Police, on the morning of December 27, 1956, and on instructions of the City Commission and City Manager, unlawfully arrested Charles L. Carter, Vice President and General Manager of Plaintiff, and nine drivers of Plaintiff's buses, and the said Chief of Police declined, when requested, to serve upon the said Charles L. Carter or said drivers, warrants charging them with any specific violation of the laws of the State of Florida, or the ordinances of the City of Tallahassee. When requested to specify the charge which was the basis for such arrests, the said Chief of Police informed said Charles L. Carter that he was being arrested for operating buses in the City of Tallahassee without a Franchise, and that the said bus drivers were being arrested for operating buses in the City of Tallahassee without a Franchise. Each of said persons so arrested, after said arrest, was released on bond by the City of Tallahassee, in the amount of \$100.00. Despite said arrests, which were made without authority of law, as there is no State Law or Ordinance of the City providing for the arrest of persons operating a bus company or driving its buses in the City without a Franchise, The Plaintiff is continuing to operate its buses in the City pursuant to its conception of its rights and privileges under the said Franchise and the aforesaid provisions of the Fourteenth Amendment to the Constitution of the United States.

(q) By reasons of the actions of the Defendants matters and things set forth above, the said Commissioners, City Manager and Chief of Police, as individuals, are liable to this Plaintiff in damages as hereinafter prayed.

(r) By reason of the actions of the Defendants and matters and things above alleged the

Plaintiff has suffered and will continue to suffer irreparable damage and injury unless the Defendants are enjoined and restrained by this Court.

WHEREFORE, Plaintiff prays:

1. That this Court will take jurisdiction of the subject matter and the parties and will enter its decree declaring the rights of Plaintiff by determining (a) whether or not the Plaintiff is legally bound to enforce the provisions of Section IV of its aforesaid Franchise, and (b) whether or not the City Commission can lawfully require the Plaintiff to suspend its bus operations in the circumstances aforesaid.

2. That upon final hearing the Court will grant to Plaintiff a permanent injunction enjoining Defendants, their officers, employees and agents from interfering with the Plaintiff as aforesaid in its operation under Plaintiff's Franchise with the City.

3. That pending such hearing or hearings herein, the Court will grant a temporary restraining order to prevent irreparable damage and injury to Plaintiff and restraining until further order of the Court, any interference with Plaintiff as aforesaid by any of the Defendants, their officers, employees and agents, in Plaintiff's operations under its Franchise.

4. That such other and further relief as is equitable and just may be granted.

5. That the Plaintiff do have and recover of and from the Defendants John Y. Humphress, J. W. Cordell, H. C. Summitt, William T. Mayo, Davis H. Atkinson, Arvah B. Hopkins, and Frank Stoutamire, as individuals, damages in the sum of \$100,000.00.

**AUSLEY & AUSLEY**  
Attorneys for Plaintiff,  
Cities Transit, Inc.

## TRANSPORTATION Buses—Florida

### INTER-CIVIC COUNCIL OF TALLAHASSEE, Inc., et al. v. CITY OF TALLAHASSEE et al.

United States District Court, Northern District, Florida, October 15, 1956, Civ. No. 584

**SUMMARY:** The Inter-Civic Council of Tallahassee, Inc., sponsored the operation of car pools by Negroes in Tallahassee, Florida, who were boycotting the city bus lines in protest against segregated seating. Criminal proceedings were begun by the city against a number of persons operating automobiles in the car pool. The council brought a complaint in federal district court seeking to enjoin any further prosecution of the criminal cases and to prevent the city police department from making any further arrests in the car pool cases. The court refused to grant the injunction, citing statutes and cases which indicate that federal courts may not intervene in state criminal actions where no substantial federal question is involved.

DeVANE, District Judge.

#### ORDER DENYING APPLICATION FOR TEMPORARY INJUNCTION

The bill of complaint for injunction filed herein today prayed for this Court to enter a temporary restraining order, and the Court having notified counsel for respondents thereof and all the parties being represented by counsel at the hearing, and the Court being fully advised in the premises finds and holds upon authority of Title 28 USC, Section 2283, and Murdock v. Pennsylvania, 319 U.S. 105; Martin v. Strothers, 319 U.S.

141; Douglas v. Jeannette, 319 U.S. 157; and Ackerman, Attorney General, v. International Longshoreman's and Warehouse Union, 187 F. 2d 86, Certiorari denied 342 U.S. 859, that it is without jurisdiction to enter a temporary restraining order prayed for in the complaint filed herein, in consideration thereof, it is

ORDERED AND ADJUDGED that the prayer for a temporary restraining order be and the same is hereby denied.

DONE AND ORDERED this 15th day of October, 1956.

## TRANSPORTATION Buses—South Carolina

**Sarah Mae FLEMMING v. SOUTH CAROLINA ELECTRIC & GAS COMPANY, a corporation.**

United States Court of Appeals, Fourth Circuit, November 29, 1956, No. 7276.

**SUMMARY:** A Negro woman in South Carolina brought an action for damages under the federal Civil Rights Acts against an intrastate bus company. The suit was grounded on the action of an employee of the bus company, a bus driver, in requiring the plaintiff to change her seat on a bus in accordance with South Carolina's segregation law. The United States District Court where the action was brought dismissed the case on the ground that the state statute requiring segregation by race was valid. 128 F.Supp. 469 (E. D. S. C. 1955). On appeal, the Court of Appeals, Fourth Circuit, reversed and remanded, applying the principle of the *School Segregation Cases* to intrastate transportation and holding that the District Court had jurisdiction under the Civil Rights Act, since the bus company, through its driver, was acting under color of state law. 224 F.2d 752, 1 Race Rel. L. Rep. 183 (1955). On appeal by the bus company to the United States Supreme Court, that court dismissed the appeal on the ground it had been prematurely brought. 351 U. S. 901, 76 S.Ct. 692, 1 Race Rel. L. Rep. 513 (1956). On the remand to the federal district court, that court dismissed the action. The ground given for dismissal was that the decision of the Court of Appeals could not be made retroactive so as to invalidate the state segregation statute as of the time of the occurrence of the event in question. A further ground stated that the bus driver could not be held to have been enforcing the statute in requiring the plaintiff to move as she was not, at the time, violating the statute. 1 Race Rel. L. Rep. 679 (Civ. No. 4386, E. D. S. C. June 13, 1956). On appeal of that decision to the Court of Appeals, Fourth Circuit, the decision was reversed and remanded. The Court of Appeals held that the separate-but-equal doctrine under which the South Carolina statute had been valid was repudiated by the United States Supreme Court in the *School Segregation Cases* prior to the happening of the events complained of in the present case and there was therefore no question of retroactive application of its prior decision in the case. As to the question whether the driver was acting under the state law when he required the plaintiff to move, the court held that there was sufficient evidence to take that question to the jury.

Before PARKER, Chief Judge, SOPER, Circuit Judge, and HOFFMAN, District Judge.

**SOPER, Circuit Judge.**

This suit was brought by Sarah Mae Flemming, a Negro woman, against the South Carolina Electric and Gas Company on the ground that on June 22, 1954, the driver of a bus operated by the defendant company required her as a passenger to change her seat in accordance with the segregation statutes of South Carolina. The District Judge dismissed the case on the ground that the State statutes were valid under the decision of *Plessy v. Ferguson*, 163 U.S. 537. On appeal this judgment was reversed and the case remanded for a new trial in an opinion, 224 F.2d 752, where we said:

"We do not think that the separate but equal doctrine of *Plessy v. Ferguson*, supra, can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers

as being governed by the same principles as segregation in the public schools; and the recent decisions in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 and *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, which relate to public schools, leave no doubt that the separate but equal doctrine approved in *Plessy v. Ferguson* has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of *Henderson v. United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302, where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination. The argument that such segregation can be upheld as a proper exercise of the state police power was answered in the

case of Dawson v. Mayor and City Council of Baltimore City, 4 Cir., 220 F.2d 386, 387, where with respect to segregation in recreational centers we said:

" \* \* \* it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional."

Upon the new trial in the District Court the case was again dismissed upon the grounds that (1) the driver was not acting under the State law to enforce the segregation of passengers when he ordered the plaintiff to change her seat, and (2) that the separate but equal doctrine of *Plessy v. Ferguson*, as applied to the bus driver, was not repudiated by this Court until after the event on which the suit is based; and that it would be unjust to apply the new rule retroactively and hold the bus company liable for damages for an act which was lawful when it was performed.

#### [Action of Driver]

We think that these positions are not tenable. It is true that most of the passengers in the bus at the time of the occurrence were Negroes who were seated or standing as far front as the second transverse seat in the bus; but the evidence on behalf of the plaintiff shows that she took a seat in the second row when it was vacated by a white woman and was immediately ordered by the driver to get up and go to the rear. This was sufficient evidence to take the case to the jury. There was additional evidence that the driver struck the plaintiff when she immediately attempted to leave the bus by the front door and was ordered to leave by the side door in accordance with the company's regulations. This evidence separately considered did not directly bear on the segregation issue, but it was admissible as part of the transaction.

On the other ground for dismissal of the case the significant fact is that the cases of *Brown v. Board of Education*, 347 U.S. 483, and *Bolling*

v. *Sharpe*, 347 U.S. 497, were decided on May 17, 1954, prior to the actions of the driver on which this suit was based. While these were school cases the opinions left no doubt that the separate but equal doctrine had been generally repudiated, as we pointed out in *Dawson v. Mayor and City Council of Baltimore City*, 220 F.2d 386, and in our prior opinion in this case.\* That this interpretation of the opinions of the Supreme Court was correct was confirmed by the recent decision of the Supreme Court in *Gayle v. Browder*, a bus segregation case, decided November 13, 1956, wherein the Court relied on its decisions in the school segregation cases, *Mayor v. Dawson*, 350 U.S. 877, and *Holmes v. City of Atlanta*, 350 U.S. 879.

In most jurisdictions it is held that reliance on a statute subsequently declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon which would otherwise subject him to liability. See 11 Am. Jur. p. 830; note 53 A.L.R. p. 269 et seq. Whether action taken under a statute valid under the constitutional doctrine prevailing at the time it was taken is protected where the statute is subsequently declared unconstitutional † we need not decide, since here the only basis upon which the statute could be sustained, the "separate but equal" doctrine, had been repudiated by the Supreme Court prior to the commission of the act constituting the ground of liability. While we think that the statute may not be relied on, under such circumstances, as a complete defense to liability, we do think that it may properly be considered by the jury on the issue of damages.

The judgment of the District Court will be reversed and the case remanded for further proceedings.

Reversed.

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\*On the same day, in *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, the Court made it clear that its decisions in the school cases were not limited to the field of education by remanding for consideration, in the light of those decisions, a case involving the rights of Negroes to use the recreational facilities of public parks. Prior thereto, on June 3, 1946, in *Morgan v. Virginia*, 328 U.S. 373, the Court held that a State statute requiring segregation of Negroes on interstate busses was an unconstitutional burden on interstate commerce; and on June 5, 1950, in *Henderson v. United States*, 339 U.S. 816, the Court held that the practice of assigning a separate table in a dining car to Negroes violated their statutory right of equality of treatment. See also the opinion of Circuit Judge Rives in *Browder v. Gayle*, D.C., M.D. Ala., 142 F.Supp. 707.

†See *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-365; *Warring v. Colpoys*, D.C.Cir., 122 F.2d 642, 645-646.

## TRANSPORTATION

### Buses—Texas

**Addie Barlow FRAZIER and Austin E. Burges v. DALLAS TRANSIT COMPANY**

District Court, Dallas County, 101st Judicial District, Texas, October 9, 1956, No. 16725-E.

**SUMMARY:** Citizens in Dallas, Texas, brought suit in a Texas state court seeking to require the Dallas Transit Company, operators of city buses, to comply with Texas statutes requiring separate seating by race in public transportation facilities. The petition stated that the defendant bus company had removed signs designating separate seating in its buses about three months previously and that this action would lead to serious injuries to persons and disturbances of the peace. The bus company answered the suit by a plea in abatement, which questioned whether the plaintiffs' interests as taxpayers would entitle them to bring such an action to enforce the penal laws of the state. The bus company also answered that it was not subject to the state segregation laws cited by the plaintiffs. The court, after hearing argument on the case, sustained the plea in abatement by the defendant and dismissed the suit. Following the judgment and orders of the court, there is set out the plaintiffs' petition and the defendant's plea in abatement and answer.

BLANKENSHIP, J.

#### JUDGMENT

On this the 9th day of October, 1956, came on to be heard the above entitled and numbered cause, when came all parties by and through their respective attorneys of record; whereupon the defendant presented its Plea in Abatement heretofore duly filed herein, and the Court, having heard the said Plea in Abatement and the argument of counsel for both parties thereon and being fully advised in the premises, is of the opinion that said Plea in Abatement should be in all things sustained:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Defendant's Plea in Abatement be, and the same is hereby in all things sustained and this suit is hereby dismissed on this the 9th day of October, 1956, at the cost of the plaintiffs.

It is further ORDERED that the defendant do have and recover of and from the plaintiffs all costs by it incurred herein, for which it may have its execution; to which ruling and judgment of the Court plaintiffs duly excepted and gave notice of appeal to the Fifth Court of Civil Appeals at Dallas, Texas.

### Plaintiff's Original Petition

Comes now Addie Barlow Frazier and Austin E. Burges, residents of Dallas, Dallas County, Texas, complaining of Dallas Transit Company, a corporation duly organized and incorporated under and by virtue of the laws of the State of Texas, with its principal office and place of business in Dallas, Dallas County, Texas. The Plaintiff Addie Barlow Frazier is a resident of Dallas, Dallas County, Texas, and a femme sole.

#### I.

Plaintiffs are resident citizens and property taxpaying patrons of the City of Dallas, Dallas County, Texas, and are owners of taxable real estate situated in Dallas, Dallas County, Texas, and they bring this suit for and in behalf of themselves and all other property taxpaying

patrons of the City of Dallas, Dallas County, Texas, similarly situated.

#### II.

The defendant, Dallas Transit Company, is a corporation organized and incorporated under and by virtue of the laws of the State of Texas, and holds a permit and license duly issued to it by the proper legal authorities of the State of Texas, to operate and maintain a transit system in the City of Dallas, Dallas County, Texas, with authority thereunder to operate streetcars and motor busses for the transportation of passengers for hire. The Dallas Transit Company has so operated streetcars and busses in the City of Dallas, Dallas County, Texas, for hire for a period of many years. That it likewise has

operated, under the laws of the State of Texas, streetcars and motor busses in the City of University Park and in the City of Highland Park, Texas. That the City Transit Company has authority to operate its busses in and upon the streets of said cities as well as other incorporated cities adjacent to the City of Dallas, the exact names of which are unknown to these plaintiffs but well known to the defendant.

### III.

Plaintiffs respectfully show to the Court that Article 6417 of the Revised Civil Statutes of the State of Texas, and subsections 1, 2, 3, 4, and 7 thereof, provide as follows, to-wit:

"Subsection 1. Every railway company, street car company, and interurban railway company, lessee, manager, or receiver thereof, doing business in this State as a common carrier of passengers for hire, shall provide separate coaches or compartments, as hereinafter provided, for the accommodation of white and negro passengers, which separate coaches or compartments shall be equal in all points of comfort and convenience.

"Subsection 2. 'Negro' defined.—The term 'negro' as used herein, includes every person of African descent as defined by the statutes of this State.

"Subsection 3. 'Separate coach' defined.—Each compartment of a railroad coach divided by good and substantial wooden partitions with a door therein shall be deemed a separate coach within the meaning of this law, and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart; and each compartment of a street car or interurban car divided by a board or marker placed in conspicuous place, bearing appropriate words in plain letters indicating the race for which it is set apart, shall be sufficient as a separate compartment within the meaning of this law.

"Subsection 4. Penalty.—Any railway company, street car company, or interurban railroad company, lessee, manager or receiver thereof, which shall fail to provide its cars bearing passengers with separate coaches or compartments, as above provided for, shall be liable for each failure to a

penalty of not less than one hundred nor more than one thousand dollars, to be recovered by suit in the name of the State; and each trip run with such train or street car or interurban car without such separate coach or compartment shall be deemed a separate offense.

"Subsection 7. Duty of conductor.—Conductors of passenger trains, street cars, or interurban lines provided with separate coaches shall have the authority to refuse any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this law, and the conductor in charge of the train or street car or interurban car shall have authority, and it shall be his duty, to remove from a coach or street car, or interurban car, any passenger not entitled to ride therein under the provisions of this law."

### IV.

Plaintiffs further represent to the Court that Article 1659, and Sections 1, 2, 4, and 6 thereof, of the Penal Code, provide as follows, to-wit:

"Section 1. Every railway company, street car company, and interurban railway company, lessee, manager, or receiver thereof doing business in this State as a common carrier of passengers for hire shall provide separate coaches or compartments for the accommodation of white and negro passengers.

"Section 2. 'Negro' defined.—The term 'negro' as used herein includes every person of African descent as defined by the Statutes of this State.

"Section 4. Violating separate coach law.—If any passenger upon a train or street car or interurban car provided with separate coaches or compartments as above provided shall ride in any coach or compartment not designated for his race after having been forbidden to do so by the conductor in charge of the train, he shall be fined not less than five nor more than twenty-five dollars.

"Section 6. Fines to go to School Fund.—All fines collected under the provisions of this law shall go to the available common school fund of the county in which conviction is had. Prosecutions under this law may be instituted in any county through or

into which said railroad may be run or have an office."

#### V.

Plaintiffs would further represent and show to the Court that the defendant, approximately three months prior to the filing of this petition, and in violation of the aforementioned Revised Civil Statute Article 6417 and the subsections hereinbefore pleaded, as well as in violation of Article 1659 of the Penal Code and the subsections thereof hereinbefore mentioned, ordered its servants, agents, and employees, to remove from its streetcars and busses, all signs designating separate coaches and compartments in its busses and streetcars, thereby permitting and causing to be permitted the seating of all passengers at any place on said streetcars and busses, regardless of race or color. That by reason thereof, and by reason of the willful disregard by the defendant of the laws of the State of Texas, the defendant is now operating and causing to be operated on the streets of the City of Dallas, its busses and streetcars in violation of the laws of the State of Texas.

#### VI.

That by reason of the acts and conduct on the part of the defendant in transporting passengers for hire on the public streets of the City of Dallas, the City of Highland Park, and the City of University Park, in permitting passengers to be seated anywhere, on any seat in said busses, regardless of race or color, the defendant is causing, and about to cause, serious bodily injury to the citizens of said City of Dallas and other cities in which it operates its busses. And that by reason thereof, there is a serious liability of a gross disturbance of the peace by its citizens, and a serious liability of the peace and dignity of the City of Dallas and other cities being harmed and disturbed, and the rights of its citizens being grossly neglected and damaged.

#### VII.

Plaintiffs further show to the Court that a controversy exists, in that they contend and maintain that the laws of the State of Texas, and particularly Article 6417 of the Revised Civil Statutes and Article 1659 of the Penal Code, are being, without authority, violated.

The defendant, on the other hand, contends that said articles aforementioned and the provisions thereof have become inoperative and unenforceable.

#### VIII.

Alternatively, plaintiffs allege that they are uncertain as to the rights, duties, and legal obligations imposed upon defendant with respect to the application and enforcement of said statutes, and that the construction of said statutes should be determined and declared by the Court, in order that the parties and all of those similarly situated may know their rights, duties, and legal obligations existing under said statutes.

#### IX.

Plaintiffs respectfully request the Court to determine and declare by its judgment that the defendant is legally bound and obligated to observe and comply with the provisions of Article 6417 and the subsections thereof heretofore mentioned, as well as Article 1659 and the subsections thereof, of the Penal Code of the State of Texas.

#### X.

Plaintiffs further allege and show to the Court that the defendant should be compelled and required by proper order of this Court, to replace the signs in and upon its busses in order to designate separate compartments for the white and colored races.

#### XI.

In the alternative, unless restrained from doing so, the defendant will continue to operate its busses in and upon the streets of the City of Dallas and other cities named in this petition, without signs designating different compartments for the white race and the colored race, contrary to the laws of the State of Texas.

#### XII.

Plaintiffs allege and respectfully show to the Court that they have no adequate remedy at law, and unless this Court issues its most gracious Writ of Mandamus, or, in the alternative, its most gracious Writ of Temporary Restraining Order and Injunction, that irreparable damage will thereby result to plaintiffs and others similarly situated.

WHEREFORE, PREMISES CONSIDERED, plaintiffs pray that the Court, on notice and hearing, issue its most gracious Writ of Mandamus requiring the defendant to comply with the laws of the State of Texas with respect to the operation of its busses; and, in the alternative, issue its most gracious Temporary Restraining Order and/or Writ of Injunction, enjoining the defendant from violation of the laws of the State of Texas.

Plaintiffs further pray that on hearing, this Court enter a declaratory judgment as heretofore requested, declaring the rights, duties, and legal obligations of the defendant, and that the defendant, under all of the facts, is legally bound and obliged to *to* observe and abide by the terms and provisions of said statutes, and that said statutes are valid and enforceable.

/s/ Ross Carlton

Attorney for Plaintiffs

FIAT

The foregoing petition having been presented

### Defendant's Plea in Abatement

Comes now defendant, Dallas Transit Company, and for its Plea in Abatement, respectfully shows to the Court that this suit should be abated and dismissed, for the reason that it affirmatively appears on the face of the petition that this is a suit brought by plaintiffs "as resident citizens and property tax paying patrons of the City of Dallas" and "as owners of taxable real estate situated in Dallas", for and in behalf of themselves "and all other property tax paying patrons of the City of Dallas", in which suit plaintiffs allege that the defendant is violating certain laws of the State of Texas, *to-wit*, Article 6417 of the Revised Civil Statutes of Texas, and Article 1659 of the Penal Code of Texas, and in which suit plaintiffs seek an order of this Court requiring the defendant to comply with said laws, and in the alternative seeking

to the Court on this the 25th day of September, 1956, that notice should immediately issue to this defendant to be and appear before this Court to show cause why a Writ of Mandamus or Temporary Restraining Order and/or Injunction should not issue, ordering the defendant to cease and desist from violating the statutes of the State of Texas; and further restraining and enjoining the defendant from so violating the statutes of the State of Texas;

IT IS ACCORDINGLY ORDERED that the defendant be and appear before this Court on the 10th day of October, A.D. 1956 9:30 A.M., to show cause why they should not be compelled and/or enjoined and restrained from violating Article 6417 and the various subsections thereof, as well as Article 1659 and the various subsections thereof, of the Revised Civil Statutes of the State of Texas, and the Penal Code of the State of Texas.

/s/ Dallas Blankenship

Judge

to enjoin the defendant from the alleged violation thereof. Defendant says, therefore, that plaintiffs and neither of them, nor the public generally, have any justiciable interest in the subject matter in litigation, either in their own right or in a representative capacity; that this action, which relates to matters of law enforcement, does not involve questions of taxation or unlawful expenditures of public funds, and, therefore, the same as a matter of law cannot be maintained by the plaintiffs, or either of them, in their own name or right, or in a representative capacity.

WHEREFORE defendant prays that this suit be abated and dismissed.

/s/ Sam P. Burford

Sam P. Burford

### Defendant's Original Answer

Subject to the foregoing Plea in Abatement, defendant files this its Original Answer and would respectfully show the Court as follows:

1.

Defendant specially excepts to said petition

and says that the same is wholly insufficient and should be dismissed, for the reason that it affirmatively appears on the face of the petition that this is a suit brought by plaintiffs "as resident citizens and property tax paying patrons of the City of Dallas" and "as owners

of taxable real estate situated in Dallas", for and in behalf of themselves "and all other property tax paying patrons of the City of Dallas", in which suit plaintiffs allege that the defendant is violating certain laws of the State of Texas, to-wit, Article 6417 of the Revised Civil Statutes of Texas and Article 1659 of the Penal Code of Texas, and in which suit plaintiffs seek an order of this Court requiring the defendant to comply with said laws, and in the alternative seeking to enjoin the defendant from the alleged violation thereof. Defendant says, therefore, that plaintiffs and neither of them, nor the public generally, have any justiciable interest in the subject matter in litigation, either in their own right or in a representative capacity; that this action, which relates to matters of law enforcement, does not involve questions of taxation or unlawful expenditures of public funds, and, therefore, the same as a matter of law cannot be maintained by the plaintiffs, or either of them, in their own name or right, or in a representative capacity.

## 2.

Defendant specially excepts to those allegations in said petition wherein plaintiffs allege that the defendant is subject to the provisions of Article 6417 of the Revised Civil Statutes of Texas, and that defendant is violating said Article for the reason that, as a matter of law, the same has no application to this defendant in the operation of its transit motor bus system.

## 3.

Defendant specially excepts to those allegations in said petition wherein plaintiff claims that defendant is subject to the provisions of Article 1659 of the Penal Code of Texas, and that the defendant is violating said Article, for the reason that, as a matter of law, the same has no application to this defendant in the operation of its transit motor bus system.

## 4.

Defendant specially excepts to all of para-

graph VI of said petition, for the reason that the allegations therein contained are all but conclusions of fact and no where do the plaintiffs set out or allege any particular or specific fact or circumstance wherein this defendant is causing, or is about to cause serious bodily injury to any one, nor do the plaintiffs allege any fact or circumstance sufficient to show a serious liability or a gross disturbance of the peace, nor is any fact alleged to show how or in what manner the rights of any citizen are being grossly neglected and damaged.

## 5.

Subject to its Plea in Abatement and the foregoing special exceptions, defendant denies all and singular the material allegations of said petition and demands strict proof thereof.

WHEREFORE, premises considered, defendant prays as follows:

1. That its Plea in Abatement be sustained;
2. Subject to said Plea in Abatement, that its special exceptions be sustained;
3. Subject both to its Plea in Abatement and its special exceptions, that the writ of mandamus and temporary restraining order sought by the plaintiffs be in all things denied;
4. That all other relief prayed for by the plaintiffs be in all things denied; and that defendant go hence without day, together with its costs, and for such other and further relief both general and special, in law and in equity, to which defendant may be justly entitled.

TURNER, WHITE, ATWOOD,  
McLANE & FRANCIS  
BY /s/ B. Thomas McElroy

Mercantile Bank Building  
BURFORD, RYBURN,  
HINCKS & FORD  
BY /s/ Sam P. Burford

Sam P. Burford  
1511 Fidelity Union Life Bldg.  
Dallas 1, Texas  
Attorneys for Defendant

## EMPLOYMENT Labor Unions—Wisconsin

**Randolph ROSS and James Harris v. Charles EVERETT, as Business Agent of the Bricklayers, Masons, Marble Masons Protective International Union No. 8 of Wisconsin, et al.**

Circuit Court, Branch No. 4, Milwaukee County, Wisconsin, November 30, 1956, No. 262-409.

**SUMMARY:** Two Negro bricklayers in Wisconsin brought a complaint before the Industrial Commission of Wisconsin against the Bricklayers International Union No. 8, alleging that the union had refused them membership because of their race. The Commission held hearings on the complaint and made findings that discrimination had been practiced. The Commission recommended that the union admit the two persons to membership. The complainants then filed an action in a Wisconsin state court seeking to require their admission to the union based on the findings and recommendations of the Industrial Commission. The court held that under the state "Fair Employment Statute" the recommendations of the Industrial Commission were not judicially enforceable. The court further held that, in the absence of a statute, the complainants had no constitutional right to be admitted to the union. [See also *Bricklayers International Union No. 8 v. Industrial Commission of Wisconsin*, 1 Race Rel. L. Rep. 909 (1956)].

CANNON, Circuit Judge.

### DECISION

This is an action commenced by two negroes, one a bricklayer and mason contractor by the name of Randolph Ross, the other plaintiff (James Harris) whose occupation is that of a bricklayer. The defendants are Charles Evert as Business Agent of the Bricklayers, Masons, Marble Masons Protective International Union No. 8 of Wisconsin, affiliated with the American Federation of Labor, and Arthur Frey as Treasurer and Assistant Business Agent of the Bricklayers, Masons, Marble Masons Protective International Union No. 8 of Wisconsin, affiliated with the American Federation of Labor (hereinafter known as the "Union").

The plaintiffs' action is one in equity wherein they are petitioning this court to order the Union to admit them into the union and to place their names on the rolls as members of the said union and to give to them all the rights and benefits of members in good standing, in compliance with the Findings and Recommendations of the Industrial Commission.

The plaintiffs contend that the basis for their requested order is set forth in their complaint and is based on an administrative finding of the Industrial Commission and recommendations that the Union "by its officers discriminated against the plaintiffs in not permitting them to join the said Union, because of their color, in violation of the provisions of Chap. 111 of the

Wisconsin Statutes as amended and directed that its findings and determination of discrimination be publicized". The plaintiffs contend that the Industrial Commission further found that in view of the said findings and efforts on the part of the plaintiffs to comply fully with the requirements of the Bricklayers, Masons, Marble Masons Protective International Union No. 8 of Wisconsin, the Industrial Commission recommended that pursuant to Sec. 111.35 of the Wisconsin Statutes that the plaintiffs herein be admitted into membership of said Union.

The defendants have demurred to the plaintiffs' complaint, alleging that this court is without jurisdiction to grant the requested relief and that the complaint fails to state a cause of action.

### [Issues Raised]

Counsels for the defendants in their brief have stated that there are two important issues raised as a result of the pleadings:

- (1) "Has this court jurisdiction to enforce the recommendations of the Industrial Commission at the request of a private litigant in a case involving racial discrimination under the Fair Employment Code of Wisconsin (Sec. 111.31-37, Stats.)?"
- (2) "Did the defendants, by denying membership to the plaintiffs because of their race, deprive them of rights

under the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin?"

The court, after listening to lengthy arguments and carefully studying the briefs submitted by the respective counsels, is of the opinion that the two aforementioned questions incorporate the most important issues to be decided in this case. Counsel for the defendant in his opening argument to the court stated: "For the purpose of this demurrer, we will admit we practiced discrimination and I hope the public will not think ill of us." Counsel for the plaintiffs contend these men (Harris and Ross) were qualified in every respect and were denied membership because of their color. Be that as it may, this court is confronted with the problem of determining whether it has jurisdiction to enforce the recommendations of the Industrial Commission made pursuant to the Fair Employment Code (Sec. 111.31-37, Stats.).

#### *[Commission Recommendations]*

The Industrial Commission on the 18th day of February, 1955, rendered its findings in the case of Ross and Harris (complainants) vs. Charles Ebert, Business Agent for Bricklayers, Masons, and Plasterers Local Union # 8 (defendant) and its conclusions were as follows:

"Now, therefore, upon the above findings, the commission determines that Local Union # 8 of the Bricklayers, Masons and Plasterers International Union of America and by its officers discriminated against Randolph Ross and James Harris in not permitting them to join said union because of their color in violation of the provisions of Chapter 111 of the Wisconsin Statutes as amended, and directs that its findings and determination of such discrimination be publicized in accordance with said chapter.

"Based upon the aforementioned findings, the commission adds an additional paragraph; that in view of the foregoing findings and the efforts of Messrs. Ross and Harris to comply fully with the requirements of Local Union No. 8 of the Bricklayers, Masons and Plasterers Inter-

national Union, it is recommended pursuant to Section 111.35 of the Statutes that the two complainants herein be admitted to membership in said union."

The Statutes pertaining to the issues involved are all incorporated within Subchapter II, entitled "Fair Employment". § 111.31, in effect, provides:

"The practices of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their race, creed, color, nationality, origin, or ancestry, is likely to foment domestic strife and unrest. . . . The denial by some employers and labor unions of employment opportunities to such persons solely because of their race, etc., and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them."

Chapter 111.31, Declaration of Policy, Sub-sections 2 and 3 in effect provide:

"That protection by law of the rights of all people to obtain gainful employment, and other privileges free from discrimination because of race, creed, etc. . . . would remove certain recognized sources of strife and unrest, and encourage the full utilization of the productive resources of the state, etc.

"It is declared to be the public policy of the state to encourage and foster to the fullest extent practicable to the employment of all properly qualified persons regardless of their race, etc."

Chapter 111.33 (Stats.) provides the Industrial Commission is to administer Sec. 111.31 to 111.36.

Chapter 111.35 (Stats.) pertains to investigation and study of discrimination.

"The Commission shall: (1) Investigate the existence, character, causes and extent of discrimination in this state and the extent to which the same is susceptible of elimination.

(2) Study the best and most practicable ways of eliminating any discrimination found to exist, and formulate plans for the

elimination thereof by education or other practicable means.

"(3) Publish and disseminate reports embodying its findings and the results of its investigations and studies relating to discrimination and ways and means of reducing or eliminating it.

"(4) Confer, co-operate with and furnish technical assistance to employers, labor unions, educational institutions and other public or private agencies in formulating programs, educational and otherwise, for the elimination of discrimination.

"(5) Make specific and detailed recommendations to the interested parties as to the methods of eliminating discrimination.

"(6) Transmit to the legislature from time to time recommendations for any legislation which may be deemed desirable in the light of the commission's findings as to the existence, character and causes of any discrimination."

#### Chapter 111.36 (Stats.) Commission powers:

"(1) The commission may receive and investigate complaints charging discrimination or discriminatory practices in particular cases, and give publicity to its findings with respect thereto."

In all of the above cited statutes, there is nowhere to be found any mandatory characteristics which would be binding upon the defendant, nor do the statutes provide the commission with any power whatsoever to enforce its Findings and Recommendations.

#### [Enforcement Powers]

The statutes in no way give to the commission any enforcement powers, other than conducting a "humiliating program" through means of publicity.

"The commission may receive and investigate complaints charging discrimination, or discriminatory practices in particular cases, and give publicity to its findings with respect thereto."

It is obvious from the reading of the Statutes 111.31 to 111.36, that the Legislature has definitely declared a policy strongly advocating fair employment opportunities to all regardless of race, color or creed, but for some reason or

other has failed to include a provision by which this policy could be enforced. The commission is totally devoid of any power, authority, or jurisdiction to order an employer or union to desist from discriminatory practices. The court is therefore of the opinion that since the legislature vested no enforcement powers in the commission, that it therefore necessarily follows that aggrieved parties have no right of appeal to the courts. The Findings and Recommendations of the Industrial Commission obviously cannot be enforced by private litigants, for the individual litigants have been given no greater rights to enforce the recommendations or suggestions of the commission in court than the legislature granted to the Industrial Commission.

It appears from a review of some of the Fair Employment Statutes throughout the country, that they are divided into two distinct classes:

(1) Statutes prohibiting racial discrimination in employment and providing for enforcement, judicial review, and in some instances criminal penalties. (This class is commonly designated "compulsory" type statutes.)

(2) The second class (such as Wisconsin) wherein is incorporated a declaration of policy against racial discrimination in employment but lacking provisions for enforcement, judicial review, or criminal penalties is known as "Voluntary or Educational" Statutes.

#### [Legislative History]

Sections 111.31 to 111.36 (Stats.) were enacted by the legislature back in 1945. The legislative history indicates that the bill, as originally introduced, was of the "Compulsory" class of Fair Employment Statute, as heretofore described. This bill was subsequently amended by the Senate and, ultimately, the amendment became law (Chap. 490, Laws of 1945). This Amendment completely changed the bill from a "Compulsory" type Fair Employment Statute to a "Voluntary" type with its declarations of policy, and remains today as the law.

In 1951, and again in 1953, action was taken to change the "Voluntary or Educational" classification of the Fair Employment Statutes to the "Compulsory" type, but in each such instance it was ultimately defeated by the legislature.

**One cannot argue that the "Voluntary or Educational" class is an oversight on the part**

of the legislature or that the legislation became enactments without due consideration, for the reasons that the legislature has created several statutes of the "Compulsory" type.

"Sec. 40.51 Wis. Stats.:—No exclusion from any public school on account of his religion, nationality or color.

"Penalty:—A member of any board of education who votes to exclude . . . fined not more than \$100.00 and imprisoned. . . ."

"Sec. 40.435 Wis. Stats.:—No discrimination shall be practiced in the employment of teachers in public schools because of their race. . . ."

"Penalty:—Fined not less than \$25.00. . . ."

The defendants in the case at bar are in effect asking this court to interpret the pertinent statutes as being of the "Compulsory" class rather than of the "Voluntary" class. When the legislature has not provided for judicial review, enforcement provisions, or penalties, it must, as a matter of law, fall into the category of the "Voluntary" class. This court does not have the power, authority, or jurisdiction to write a provision into a statute, which the Legislature on several occasions expressly and specifically rejected. It, therefore, must follow that the legislature never intended to vest the Industrial Commission with the jurisdiction to enforce the provisions of the Fair Employment Act.

"Again and independent of the foregoing but leading to the same conclusion so far as this case is concerned, is the rule that when a new right is given by statute and at the same time a remedy provided for its enforcement, such remedy is exclusive." Chicago & N.W.R. Co. v. Railroad Com., 162 Wis. 91

It is an elementary principle of law that the courts do not have the power to amend or create statutes.

"The situation presented is somewhat novel and one for which the lawmaking power has apparently made no provision that would warrant the practice here followed. This court has no power to make a new statute or to amend an existing one so as to reach a case of supposed hardship, or for any other reason for that matter." Schneck v. Sterling, 151 Wis. 266

Trial courts are vested with the power to only interpret the law, and not to enact or legislate.

"It is the duty of the court to construe the law, but we have no power to legislate. In order to adopt the respondent's construction of the statute, we would have to entirely eliminate that portion of the statute which provides: . . ." State ex rel Milw. v. Ames 227 Wis. 643

Under our system, the government is divided and separated into three branches—Legislative, judicial, and executive. It has always been a wise and sound principle that no branch does or should interfere with another. It is not for the judicial branch to dictate or suggest to the legislature what should or should not be incorporated within its enactments. By the same token, the judiciary is not empowered to change by amending or modifying legislative enactment through judicial determinations. This court has no power to create a right or to place teeth in a statute which the legislature on two previous occasions rejected.

"It is urged in plaintiff's behalf that he at all times opposed the organization of the district, the adoption of the plan, and has done everything he could do to protect his interests, and therefore that the law should afford him a remedy. The question of whether or not he has a remedy is not before us. The question under consideration here is whether or not he has a right to recover damages from the district. Even though the law operates harshly in a particular case, the state has in its capacity as a sovereign, for the promotion of the public health and general welfare, ordained the procedure to be followed in cases of this kind, and if by reason of the provisions of the statute the plaintiff has sustained a loss, the courts cannot give a remedy where the law gives none." McMahon v. Tower Baraboo River Dist. 184 Wis. 611

The plaintiffs have not been denied the remedy which the statute affords to them. The Findings of the Industrial Commission were publicized and disseminated. This is the only remedy which the Act gives to the plaintiffs. There is no provision within the Fair Employment Act which gives to this court any power

to penalize the defendants because they have failed to abide by or adhere to the findings and conclusions of the Industrial Commission, as rendered in the above entitled action on the 18th day of February, 1955. The power would be vested in this court only in the event the Fair Employment Act included all the necessary elements to categorize it as a "Compulsory" class.

*[Right to Membership]*

The second important issue raised by the defendants in their brief is:

"The complaint does not state a cause of action because the defendant union, by denying membership to the plaintiffs because of their race, did not deprive them of legally recognized rights."

Counsel for the plaintiffs contends that admission into the union membership is a right and not a privilege pursuant to Sec. 111.31-32 Stats.

Nowhere in this Act is the court able to find that admission into a labor union is a matter of right.

"Like other associations, trade unions may prescribe qualifications for membership. They may impose such requirements for admission and such formalities of election as may be deemed fit and proper. Moreover, they may restrict membership to the original promoters, or limit the number to be thereafter admitted. No person has an abstract or absolute right to membership." 31 Am. Jur. Labor Sec. 58 pp 861.

It is a privilege and not a legal right to become a member of a voluntary association. No one has a legal right to become or remain a member of a voluntary association except at the will of the membership.

"Membership in a voluntary association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The courts cannot compel the admission of an individual into such an association and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion. The acceptance of, or intention by the

person in question to accept, membership in an unincorporated association is necessary to make him a member of the organization." 4 Am. Jur. Sec. 113 pp 462.

"Membership in a labor union, despite its economic importance . . . is still regarded as a privilege which may be granted or withheld by a union." Colson v. Gelbert 80 N.Y.S. 2d 448. (Citing cases.)

In Feinne v. Monahan, 24 LRRM 2588, the Court held:

"Membership in a labor union is a privilege which the law in this state permits a union to deny, however worthy the applicant and unfortunate his economic plight because of his exclusion. There is no charge here that the denial of membership was brought about by unlawful conduct or that the union resorted to coercion or other improper means to deprive the plaintiff of employment. In final analysis the sole grievance is the refusal to admit the plaintiff to membership. The law does not regard such refusal as actionable." (Citing cases.)

It must therefore follow, that if one does not have a legal right to become a member of a union, no legal right can be denied when his application for membership is rejected.

*[No State Action]*

Plaintiffs' counsel contends that they are entitled to the protection of the Federal Constitution under the Fourteenth Amendment and also under Article I, Sec. 1 of the Wisconsin Constitution. An analysis of the leading cases clearly indicates that it is a well established principle of law that the constitutional provisions, including the Bill of Rights, apply only as limitations upon official governmental action and not upon the conduct of individuals. It is a legal impossibility for a private citizen, association, or club to deprive the plaintiffs of any constitutional rights.

"The principle has become firmly embedded in our Constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however

discriminatory or wrongful." *Shelley v. Kraemer* 334 U.S. 1

"Thus, where a person is unlawfully discharged by his employer such action even if wrong is individual and not state action, and Civil Rights Acts do not apply (cases cited), and their acts do not constitute a violation of the Fourteenth Amendment.

"Whether plaintiff was in fact unlawfully discharged does not appear. Even if his discharge was unlawful, however, it was not caused by any officer of the state, and this court therefore has no jurisdiction." *Barnes v. Atlanta Transit System Fed. Dist. Ct., Ga.* 38 LRRM 2490

In view of the above authorities, the court is of the opinion that the rights which are delegated to the citizens by reason of the Fourteenth Amendment and the comparable provisions of Article I, Sec. 1 of the Wisconsin Constitution are protected from deprivation only by the state, and no action based upon the Constitution lies against individuals for their conduct, even under circumstances where similar action by a state would constitute deprivation of constitutional rights. In other words, it is a legal impossibility for a private citizen, club, or union to deprive another of any constitutional right.

Counsel for the plaintiffs further contends:

"This court has jurisdiction to grant the relief requested pursuant to Sec. 9, Article I, Wisconsin Constitution for the reason that the continued violation by the union is against public policy set forth in Sec. 111.31-36 Stats."

Counsel is of the opinion the jurisdiction of the court is warranted by Sec. 9 of Article I of the Wisconsin Constitution which, in part, reads as follows:

"Remedy for Wrongs. Sec. 9. Every person is entitled to a certain remedy in the law for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely and without being obliged to purchase it, completely, and without denial, promptly and without delay, conformably to the laws."

It is the plaintiffs' contention that in view of the above quoted Article of the State Con-

stitution, the court must order the union to accept the plaintiffs as members, because the Constitution guarantees them a remedy for "all injuries or wrongs". This contention is correct when such injury results from an invasion of a legal right.

"The Constitutional guaranty insuring a remedy for injuries to person and property, etc., does not guarantee a remedy for every species of injury, but only such as results from an invasion or an infringement of a legal right or a failure to discharge a legal duty. . . ." 16 C.J.S. Const. Law pp 1496, Sec. 709

"Accordingly, for this constitutional guaranty to be pertinent, it must first be established that plaintiff has suffered a legal injury or wrong by reason of defendant's conduct." *Schoeberg v. Itnyre* 264 Wis. 211

#### [No Legal Duty]

This court is of the opinion, and so finds, there is no existing legal duty on the part of the defendants that they must accept the plaintiffs as members of the union in question. Since no Wisconsin Statutes confer such right, it must follow as a matter of law that no legal injury was sustained by the plaintiffs.

The court recognizes the serious economic and social problem which confronts the plaintiffs in the above entitled action. Discriminatory practices invoked by any individual or group of individuals is morally wrong.

"We may deplore religious prejudices and intolerance ever so much, but the remedy does not lie with the courts. The remedy is cultural and educational, and perhaps to some extent legislative. However, the freedom we claim for ourselves to believe in any or no religion, to belong to any religious society or to none, to think and express ourselves as we choose, so long as we violate no legal duty, makes it impossible to prevent our fellow members of society from exercising the same rights." *Polacheck v. Milwaukee Golf Club*, 197 Wis. 595.

#### CONCLUSIONS

The Court is therefore of the opinion, and so finds:

(1) That this Court has no jurisdiction to

enforce the recommendations of the Industrial Commission made pursuant to the Fair Employment Code (Section 111.31-37, Stats.).

(2) That the complaint does not state a cause of action because the defendant union, by denying membership to the plaintiffs because of their race, did not deprive them of legally recognized rights.

(A) That membership in a labor union, despite its economic and social importance is still regarded as a privilege, which, in the discretion

of the union, may be granted or denied.

(B) That it is legally impossible for a union to deprive another of any Constitutional right.

(C) That the Constitution guarantees to everyone a remedy for "all injuries or wrongs," when such injury results from an invasion of a legal right.

(3) That the demurrer interposed by the defendant union is hereby sustained.

(4) That no costs be taxed herein by any party against any other party.

## EMPLOYMENT

### Railroads—Federal Statutes

Cassie S. PENNINGTON v. MISSOURI PACIFIC RAILROAD COMPANY, Debtor, and the Debtor's Trustee.

United States Court of Appeals, Eighth Circuit, December 21, 1956, No. 15619.

**SUMMARY:** Prior to the completion of the reorganization in bankruptcy of the Missouri Pacific Railroad Co., a Negro, now retired, who had been employed as a porter by the company for some thirty-five years filed an application for leave to intervene in the reorganization proceedings in federal district court. The application for intervention was grounded on a claim for a wage differential asserted against the company and the trustee in bankruptcy. The applicant stated that he and other Negro porters similarly situated had performed the same duties as white brakemen during the pendency of the reorganization, but had been denied the differential in pay by reason of discrimination based on race and color. The district court denied the application to intervene. On appeal the Court of Appeals, Eighth Circuit, held that the application to intervene was a permissive matter and, the denial having been made in the sound discretion of the court, was not appealable.

Before SANBORN, WOODROUCH and WHITTAKER, Circuit Judges.

WOODROUCH, Circuit Judge.

The appellant is a colored man who worked on the Missouri Pacific Railroad as a train porter from about 1917 to about February 29, 1952, when he retired. More than three years after his retirement, he filed an application in the Missouri Pacific Reorganization Proceedings for leave to file an intervening petition and claim therein against the Debtor Company and its Trustee. He attached to the application and made a part thereof a proposed intervening petition and claim in the nature of a class action for a declaratory judgment and for damages arising out of alleged wrongful discrimination against himself and other train porters on account of their race and color. All of the "train porters" are Negroes and the petition alleged

that the "train porters" performed substantially the same class of work as the "white passenger train brakemen" employed on the railroad, and work additional to the work done by the "brakemen," but that solely by reason of discrimination on account of race and color, the "train porters" received considerably less pay than the brakemen for their work. The Reorganization Proceedings of the Missouri Pacific Railroad Company began in 1933 and it was alleged in the intervening petition that a differential in the wages paid the colored train porters and the wages paid the white brakemen continued during the trusteeship. The petition presents that the Trustee was an officer of the federal court and that discrimination on his part based on race or color of the employees was in viola-

tion of the Fifth Amendment of the Constitution of the United States. The prayer of the petition was for recovery of additional wages for appellant and for the train porters for the period that the Trustee operated the railroad and for declaratory judgment that train porters have been and are entitled to be paid the same wages as those paid to passenger train brakemen.

[*Trustee's Defense*]

Guy A. Thompson, Trustee of Debtor, filed Suggestions in Opposition to the Application for Leave to File Intervening Petition. His principle objection to the intervention was the fact that the reorganization of the railroad was about to be finally terminated at the time that the power of the court was invoked to grant leave to file the petition of intervention. The Trustee referred to the record which shows that after some twenty-three years of administration, a Plan of Reorganization had finally been approved and thereafter confirmed, and before appellant's application to intervene was reached for decision, an order had been entered conditionally dismissing the Trustee and turning the railroad property over to the reorganized Missouri Pacific Railroad Company. That company assumed unpaid obligations of the Trustee and the Debtor and could be sued therefor in any court of competent jurisdiction.

The Trustee also denied liability of the Debtor or himself to the applicant for intervention and asserted that the proposed petition failed to state facts sufficient to constitute a justiciable cause of action.

The application for leave to intervene was filed October 19, 1955, and the Suggestions of the Trustee in Opposition on November 30, 1955. The issue as to the granting of leave was briefed on both sides and the time for filing the last brief was February 15, 1956.

[*Decision of District Court*]

On March 30, 1956, the court entered the order denying leave to intervene as follows:

"The Court having before it the application of Cassie S. Pennington for leave to file his intervening petition and his claim against the Debtor and the Debtor's Trustee, and having examined said application, heard the argument of counsel, studied the briefs

of the parties, and being fully advised in the premises, DOTH ORDER that said application be and the same is hereby denied."

This appeal has been taken to reverse that order but the appellee contends that the intervention was a permissive matter within the discretion of the court; that the intervention was not indispensable to the preservation or enforcement of appellant's claims; that appellant was in no wise adversely affected by the transfer of the Debtor's property to the Reorganized Company on the prescribed terms and conditions or by the judgments entered consummating the Reorganization Proceedings; that the order denying intervention did not purport to and did not make any final determination of any of the merits of the claims on which the application for intervention was based; and that the order was not a final order for purposes of appeal.

We think the position of the Trustee is sound and fully supported by the facts shown in the record and by the precedents.

[*No Intervention As of Right*]

There is no federal statute conferring an unconditional right upon the appellant here to intervene by reason of the claims asserted in his petition. Section 77(c)(18) of the Bankruptcy Act provides that "upon petition therefor and cause shown" any "interested party may be permitted to intervene." (Title 11 U.S.C. Sec. 205.) It does not provide that such intervention shall be permitted as a matter of right. Rule 24 of the Rules of Civil Procedure defines the distinction between "Intervention of Right" covered in 24a and "Permissive Intervention" covered in 24b.

Intervention as a matter of right exists only (1) when a statute of the United States confers an unconditional right to intervene; or (2) when applicant's representation is inadequate and he is or may be bound by a judgment in an action; or (3) when applicant will be adversely affected by a distribution or other disposition of property in the custody of the court.

The case at bar does not meet any of those requirements. At the time the court acted upon the application for intervention, the Consumption Order and Final Decree had been entered and in force in the Reorganization Proceedings for thirty days and it was evident that no judgment in respect to the appellant's

claims had been rendered against him. The restoration of the Debtor's property to private ownership was conditioned by sections 8.01 and 8.03 of the Consummation Order as follows:

"8.01(d). The Reorganized Company shall pay in cash, or assume, without further action by this Court, all claims in so far as not paid prior to the Consummation date [March 1, 1956] in respect to the following: \* \* \*

(xi) All obligations incurred by the Trustee of the Debtors and of the Natchez & Southern Railway Company in his official capacity as bankruptcy trustee pursuant to the authority of this Court."

"8.03. From and after the Consummation Date, there shall be no liability on the Trustee of the Debtors \* \* \* for any obligation incurred by him in his official capacity as bankruptcy trustee pursuant to the authority of this Court; and the Reorganized Company shall alone become and be liable for any and all such obligations in the place and stead of the Trustee of the Debtors \* \* \*"

It is obvious therefore that at the time Judge Moore denied the intervention no good purpose could have been served by granting it. It was then clear that the termination of the Reorganization Proceedings and restoration of the railroad to the Reorganized Company subject to the foregoing obligations and liabilities did not adversely affect any right asserted by the applicant for intervention. It left him entirely free to litigate his claims directly against the party he charges with liability in any court of competent jurisdiction.

#### [Decision Not Appealable]

Judge Moore made no findings adverse to appellant and his order denying the intervention applied for shows clearly that it was entered in the exercise of sound discretion. As the intervention applied for was a permissive matter and sound discretion was exercised in denying it, the order of the court "falls below the level of appealability."

In Railroad Trainmen v. B. & O. R. Co., 331 U.S. 519, 524, the Court said:

"Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order

denying leave to intervene where intervention is a permissive matter within the discretion of the court. \* \* \* The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that may be entered in the case. He is at liberty to assert and protect his interest in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability."

In Blumgart v. St. Louis-San Francisco Railway Co., 94 F.2d 712, 716, Judge Stone, speaking for this court, said:

"Clearly, it is the law that where the matter of intervention is discretionary and not a matter of right, an order denying intervention is not a final order for purposes of appeal, but where intervention is a matter of right, such order is appealable."

In Credits Commutation Co. v. United States, 177 U.S. 311, 315, the Supreme Court quotes with approval the following from this court's decision in the same case, *to-wit*:

"When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form or proceeding. Such an order not only lacks the finality which is necessary to support the appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court."

Numerous other decisions to the same effect are cited and relied on in Judge Sanborn's opinion in Slupsky v. Westinghouse Electric & Mfg. Co., 78 F.2d 18, 15.

The applicant for intervention in this case could have brought an action on the claims of his petition at any time during the Trustee's operation of the Debtor railroad without leave of the Bankruptcy Court under Title 28 U.S.C.A.

Sec. 959, or he might have been permitted, in the court's discretion, to litigate his claims in the Reorganization Proceedings if he had made timely application to do so. But at the time decision was made on the issue of intervention, it is manifest that no good purpose could have been served by granting the leave applied for. The object of the Reorganization Proceedings to consummate a Plan for restoration of the Debtor's property to private control had been finally achieved and the way opened to appellant to litigate his claims against the railroad directly with the railroad.

Both parties to this appeal have briefed and orally argued the questions as to the sufficiency of the plaintiff's petition but, as stated, Judge Moore's order does not indicate that he made any findings or expressed any conclusion in respect to those questions and as we conclude that the order "falls below the level of appealability," we also decline to pass upon the sufficiency or merits of the proposed petition. Our Order is that the appeal be and the same is dismissed.

Dismissed.

## PUBLIC ACCOMMODATIONS Apartments—Connecticut

**McKINLEY PARK HOMES, Incorporated v. COMMISSION ON CIVIL RIGHTS, State of Connecticut.**

Superior Court, Hartford County, Connecticut, November 5, 1956, No. 106389.

**SUMMARY:** A Negro in Hartford, Connecticut, filed a complaint with the state Commission on Civil Rights against the McKinley Park Homes, Inc., lessors of privately-built apartments in that city, stating that he had been rejected by the corporation as a prospective renter solely on the basis of his race or color in violation of a state statute. That statute (§ 3276d, Connecticut General Statutes, 1955 Supp.) forbids discrimination on account of race, creed or color in "public housing projects and all other forms of publicly assisted housing." At hearings before a tribunal of the Commission the corporation defended on the grounds that there had been no racial discrimination in refusing to rent to the complainant and that the corporation was not subject to the statute. The Commission found the discrimination to have been established and held that the corporation, having obtained special tax abatements from the city of Hartford, came within the statutory description of "publicly assisted housing." The Commission issued an order to the corporation to cease and desist from refusing to rent an apartment to the complainant. On appeal of this order to a Connecticut state court, the court held that there was insufficient evidence on which the determination of the Commission could be based and ordered the complaint dismissed without reaching the question of the statutory coverage of the corporation.

COTTER, J.

### MEMORANDUM OF DECISION

This is an appeal from the findings and decision of the Commission on Civil Rights made after a hearing before a panel of three members of a hearing tribunal. An opinion was rendered in which it was concluded that McKinley Park Homes, Incorporated discriminated against one Samuel J. Cullers, because of race. An order was issued directing McKinley Park Homes, Incorporated to cease and desist forthwith from

refusing to rent an apartment located on Dauntless Lane, Hartford, Connecticut, to Samuel J. Cullers.

The complaint was filed with the Commission on Civil Rights by Samuel J. Cullers on April 25, 1955, Exhibit A. It recited that on April 18, 1955 Cullers visited the office of the McKinley Park Homes, Incorporated, to check on an application for an apartment which he had placed approximately a year before. The complainant asked to file a new application. A Mrs. Naass, who was in charge of the office, said that they

had no more forms. She, however, typed out a facsimile form which the complainant completed and filed in the office. He was informed that there were no vacancies at the time. This complaint as filed with the Commission and upon which the hearing was held, is taken to concern this episode which took place on April 18, 1955. The testimony of the complainant in support of this complaint is found in the transcript of testimony taken before the panel on pages 19-37, inclusive.

#### [First Application]

As to the application which was filed in 1954, there is nothing in the evidence upon which to base a finding that the appellant knew at any time of the race of the applicant. His only contact at that time with the renting office was by telephone or through the mail. He originally called the office and asked for an application which was mailed to him. He mailed it back and his other contacts were by telephone. He called twice on the telephone. It was testified that one of the requirements was that the applicant appear in person before the application would be considered. At no time did he appear in person in connection with this first application of 1954.

It would seem, therefore, that the issue raised in this particular matter, as set forth in the complaint, is confined to the dealings which took place in connection with the application of April 18, 1955. His testimony in connection with this matter reveals the following, upon examination by Attorney Cannon for the Commission:

"Q. Why did you file that complaint?

"A. Because I did not feel that my application would be honored by the McKinley Park Homes Corporation. My past experience with them led me to believe that they might even tear it up after I left. I was suspicious of the fact that she said she had no more applications after I went in there. I just saw her finishing filling out one for another woman while I was in there.

"And all of these suspicions tended to make me think that my application would not be given fair consideration."

He also stated he was further suspicious "that they might even tear it up after I left."

#### [Questions Raised]

After the application was filed he never followed it up again. (T. p. 29) It would appear from the testimony of the complainant that at the time he filed this application on April 18, 1955, he was apprehensive and suspicious from the moment that he asked the girl in the office for an application to rent an apartment. It would seem that the gist of the complaint, in considering all of the evidence introduced, is summarized in the testimony of the complainant when he testified as to what transpired upon the day he asked for and filed his application in person. The case was very well and ably tried on both sides but the great mass of the evidence involves transactions which occurred many weeks and months after the events of April 18, 1955 and April 25, 1955. April 18, 1955 was a Monday and the complainant filed his complaint with the Commission on Civil Rights on the following Monday, April 25, 1955. This gave the McKinley Park Homes, Incorporated approximately five business days to act upon the application of the complainant. When no action was forthcoming within that short space of time he immediately filed his complaint. At that time he states that he had in mind that others had been given a rent within one week from the time they filed their application for it. After the complaint was filed with the Commission there was no follow-up upon the part of any of the parties with respect to renting an apartment in this development. The appellant seeks to reverse the decision of the Commission on the grounds that there is insufficient evidence to establish discrimination upon their part because the Commission has not established the complaint by proof which is "substantial and competent"; that the statute under which the Commission is proceeding which prevents discrimination on account of race, creed or color in "public housing projects and all other forms of publicly-assisted housing" does not apply to McKinley Park Homes, Incorporated because they are not publicly assisted housing; that to include the appellant within such a class would be against the Constitution of the State of Connecticut and the Constitution of the United States in that it impairs the obligations of contract and is an abuse of the due process clause and equal protection clause of the Constitutions and that the term "publicly assisted housing" is too vague and

unclear to satisfy the requirement of the due process.

*[Requisites of Fair Trial]*

It is fundamental in our civil and criminal law that a person is entitled to have a matter tried upon allegation of a complaint, information, warrant or indictment which succinctly and clearly state or spell out the cause of action or charges upon which the complainant relies. Lewandoski v. Finkel, 129 Conn. 526, 530; State v. Delmonto, 110 Conn. 298, 299. The criminal law especially is very solicitous of the rule that a person charged with a crime is entitled to know the specifications and particulars of such a crime with which he is to be charged and upon which he is to be tried and convicted or acquitted.

"The function of an information under our practice, as well as of the indictment more commonly used in other jurisdictions, is to charge the person named in it with the commission of a crime the nature of which is therein set forth." State v. Delmonto (*supra*) p. 299.

This theory of our law is well stated by O'Sullivan, J. in his dissenting opinion in the case of State v. Genova, 141 Conn. 565, at p. 572, in which he says:

"the defendant had the constitutional right to assume that the information set forth the exact charge for which he was to be tried and upon which he was ultimately to be convicted or discharged. Conn. Const. Art. I § 9; U.S. Const. Amend. VI. Nothing is more elementary in criminal law than that an accused is required to defend only against the charge alleged. State v. Scott, 80 Conn. 317, 321, 68 A. 258; see State v. Di-Lorenzo, 138 Conn. 281, 284, 83 A. 2d 479."

Section 7407 (b) of the General Statutes provides, in part:

"The findings of the hearing tribunal as to the facts, if supported by substantial and competent evidence, shall be conclusive."

The meaning of the words "substantial and competent evidence" has been thoroughly considered and discussed by our court in International Brotherhood v. Commission on Civil Rights, 140 Conn. 537, pp. 542-544, inclusive. The Court states that findings cannot be based on a "mere scintilla of evidence" and that such a matter as this concerns intent and motive.

*[Evidence Insufficient]*

From the actions of Mrs. Naass in the office of the appellant on April 18, 1955, we cannot infer an intent and motive upon her part to discriminate against Cullers were we to follow the test set out in the International Brotherhood case, *supra*, p. 542, viz.:

"... whether the evidence, fairly and impartially considered, is likely to induce in the minds of men of ordinary intelligence, attentively considering it and using common-sense logic, a reasonable belief that it is more probable than otherwise that the fact in issue is true."

While she took some time to look for forms of application and then typed a facsimile out for the applicant one might become suspicious but it is difficult to find that such conduct would lead a fair, impartial man of ordinary intelligence, attentively considering it and using common-sense logic, to a reasonable belief that it is more probable than otherwise that she was discriminating rather than seeking to help the applicant in making such an application for housing. The Court agrees with the complainant that the situation creates a suspicion. It is suspicious as Cullers claims, but it does not satisfy the test our Court has laid out above.

Findings, orders and decisions cannot be based upon suspicions but upon proof in accordance with the test enunciated by our courts.

In view of the decision of this Court that there was insufficient evidence upon which to base the findings of the Commission and its order, it is unnecessary to discuss the other claims of the appellant.

The issues are found for the appellant. The findings inconsistent with this opinion are ordered revised and the complaint is dismissed. The appeal is allowed.

**ELECTIONS****Registration—Georgia**

**Bessie HARRIS et al. v. Earl S. ECHOLS, etc. as Registrars of Pierce County, Georgia.**

United States District Court, Southern District, Georgia, November 2, 1956, 146 F.Supp. 607.

**SUMMARY:** Negroes in Pierce County, Georgia, brought an action in federal district court against the county registrars seeking to restrain that body from removing their names from the lists of voters in the county. On the filing of the complaint the court granted a temporary restraining order. Thereafter, at the trial, it was shown on behalf of the registrars that some of the plaintiffs who had been challenged had not, in fact, been removed from the lists. The court found that the challenges and hearings thereon had been conducted in accordance with the state law and that no showing had been made of unlawful racial discrimination and refused to grant a permanent injunction.

SCARLETT, District Judge.

**OPINION OF THE COURT AND  
JUDGMENT DENYING PERMANENT  
INJUNCTION**

**STATEMENT OF THE CASE**

The Plaintiffs in the case are Bessie Harris, I. J. White, F. J. Brown, Emma Dugger, James L. Bevins, Nancy Boyer, Pete Jones, Leon Howard, Ethel Holmes and David Collins. The Defendants, Earl E. Echols, J. Alvin Davis and J. F. Sapp, are the Registrars of Pierce County, Georgia. By amendment filed by the plaintiffs on September 22, 1956 after this case was closed the following parties were made additional plaintiffs:

Charles Smiley, Carrue Lue Smiley, Vernelle Chancey, Henry Lee Nails, J. H. Washington, Joseph Smith, Nane Whitehead and Robert Askley and Idella Miles, Dan Brown, Rosa Lee Tyson Youman, Lillie Mae Douglas and Jesteen Surrency.

The petition was filed on August 11, 1956 and is for injunctive relief to prevent removal of the names of Negroes from the voting lists of Pierce County, Georgia. On the petition, The Court granted an order providing for a hearing on August 17, 1956, and commanding that until the hearing the defendants "cease and desist from considering any illegal challenges filed with them in connection with the names of Negroes in Pierce County, Georgia by J. C. Parker or any one else."

The temporary restraining order was prepared by attorney for plaintiffs. There were certain motions made by the defendants which the

Court took under advisement until he rendered a final judgment in this case. Two amendments have been filed by the plaintiffs since this case was closed however, these two amendments are allowed for the purpose of filing and hearing of same over the objections of defendant's counsel, as hereinafter stated.

At the beginning of the hearing of August 17, 1956 and before the introduction of any evidence a motion was made by counsel for plaintiffs for continuance of the hearing without any statement about how long it was sought to have the hearing postponed. The continuance was requested because of the absence of a witness, namely J. C. Parker, who signed challenges of the rights of plaintiffs and the other Negroes referred to in their petition to have their names entered on the voting list of Pierce County, Georgia. Plaintiffs' counsel stated that he wanted to prove that the witness "was not qualified to challenge these people's rights to vote." In connection with this statement he also said, "We do not know whether there was a J. C. Parker as a matter of fact. We want him here if there is such a man." He also stated, that he "had a subpoena issued for the witness." The subpoena was produced and had an entry thereon by the Deputy Marshal that it was received on August 14, 1956 and that he endeavored to serve it. The Deputy Marshal testified that he went to Parker's home in Pierce County to serve him with the subpoena, that Parker while living in Pierce County, was working in Jacksonville, Florida during the week and returned to his home every week end in Pierce County, Georgia and that no money was furnished to him to pay Mr. Parker's per diem and expenses to come to Court as the law re-

quires. Counsel for plaintiffs made no positive statement that he could show by Parker that he was not a citizen of Pierce County, Georgia, in fact, counsel for Plaintiffs said "he did not know if there was such a man as J. C. Parker." Indeed, a colloquy between counsel for Plaintiff and the Court indicated that he was not sure that he could prove by Parker that he was not a citizen of Pierce County, Georgia which colloquy was as follows:

"ATTORNEY SCOTT: 'Well, just suppose, your Honor, that he is not a citizen.'

THE COURT: 'Well have you proved that he is not a citizen?'

ATTORNEY SCOTT: 'Without the records of the Court, if he was brought here in Court we can ask him if he is a citizen of Pierce County. I think, on oath, he would be subject to punishment, if he is not a citizen.'

THE COURT: 'Well, that's up to you to prove that. Can you prove it?'

ATTORNEY SCOTT: 'I can't prove that this man is or is not a citizen when he is not here.'

Although plaintiff had a number of proposed witnesses from Pierce County present he offered no evidence that J. C. Parker was not a resident of Pierce County, Georgia.

During the case on its merits, two long time residents of Patterson, Georgia, in Pierce County, namely, W. J. Ritch and Foster O'Quinn, testified that J. C. Parker was a resident of Patterson for four or five years and had built him a home there last year. It was also shown by another witness that Parker was a qualified voter of Pierce County, Georgia.

The showing made by plaintiffs did not entitle them to postponement of the hearing on account of the absence of the witness, J. C. Parker. To entitle one to a continuance because of the absence of a witness, it must be shown that such continuance is reasonably necessary for a just determination of the cause, what the testimony of the absent witness will be, that it will be relevant to the issue involved and that the witness can probably be obtained if the continuance is granted, and that due diligence has been used to obtain his attendance at the hearing or trial. *Neufield vs. U. S. (CA-DC) 118 F.2d 375 (3); Samora v. U. S. (CA 9), 112 F.2d 631 (2), 634 (2d Col) and 17 C.J.S., pp 225 and 226, Sections 48 and 49.*

#### FINDINGS OF FACT

On the hearing had on August 17, 1956 only three of the plaintiffs testified, namely I. J. White, F. J. Brown and David Collins. In their testimony White and Brown admitted that they had not been challenged and actually voted in the Democratic Primary held in Pierce County on August 7, 1956. This testimony was given by them despite the fact that the petition alleged that their names were stricken from the voting list of Pierce County and that White had signed the oath verifying the petition making such allegation, which he admitted when testifying on said hearing.

David Collins testified that he was present at the hearing had by the registrars on August 6th, 1956 and that he received notice of it on Saturday before the hearing took place on the following Tuesday. He claimed to be a registered voter, but did not remember when he registered. He stated that it was some two or three years ago, and he did not remember whether he had voted since that time.

There was no testimony by David Collins that the registrars discriminated against him in any way. He did not testify that he had taken the oath required by law in order to register or that he possessed the requisite qualifications for registration, and he did not testify that he was on the voters' list in 1954.

It is a well settled rule of law that in the matter of asserting constitutional rights, only one who shows himself injured may complain, and that he can not champion others who do not choose to complain. *Cook v. Davis (CA 5), 178 F.2d 585 (1); 47 C.J.S. p. 51, sec 100; 67 C.J.S. p. 920 sec. 13(b); 3 Moore, p 3418, par 23.04, and First National Bank of Shreveport v. Louisiana Tax Commission 53 S. Ct. 511 (4) and 11 Am Jur., p 759, sec. 114.*

It was not shown in the hearing on August 17, 1956 that any colored person who had registered except some of those who had been challenged was omitted from the voting list prepared by the Registrars for 1956. There was no definite evidence as to just how many were challenged and just how many of the challenges were sustained.

S. F. Memory, County Attorney, a lawyer of splendid character and state wide reputation as an attorney and attorney for defendants testified that he had been practicing Attorney for fifty (50) years and that he gave plaintiffs a

full hearing, and in most cases their petitions were granted. He testified "the Registrars were not technical about it, and I am quite sure that no man or woman was denied the right on account of race or previous condition of servitude, I am sure that didn't enter into it. The challenges were on the ground, well they speak for themselves, that they had not taken the oath required by law and did not possess the qualifications, that is, understanding the Constitution or the duties of citizenship that is required by law. That was the ground of the challenge and it was very specific."

Mr. Memory also testified that there were not more than 60 who requested a hearing on the challenges and that out of that number not more than 15 were left off the voting list, and that quite a number of them had not signed the voter's oath required by Georgia Law. There was no evidence whatever that the registrars undertook to pass on the right to vote of any person who had registered except those who had been challenged. Not one iota of testimony showed that the registrars denied to any Negro challenged the right to vote because of his race, color or previous condition of servitude.

It was also shown by the testimony of said Foster Memory that a fair hearing was accorded to every one challenged who asked for it, that all notices required by the law were given and were mailed by him personally, and that in giving of such notices all the requirements of law were observed, except that the notice of hearing to one of the challenged, Emma Dugger, did not give the date and hour she would be heard, but it was shown that she appeared at the hearing and was heard by the registrars and her name allowed to remain on the voting list and that afterward she voted in a primary election held in said County.

#### CONCLUSIONS OF LAW

The Challenger, J. C. Parker, is not a party to this case. There are no allegations in the petition or any evidence that would connect him with the defendants in the alleged acts as charged in the petition. A subpoena was issued for J. C. Parker but through negligence of the plaintiff's attorney he was not served. No valid reason was made for a continuance. This case is whether the defendants, Earl Echols, Alvin Davis, and J. A. Sapp performed their duties as Registrars as the law provides.

Section 34-132 of the 1955 Supplement to the Code provides that the registrants shall have the right and be charged with the duty of examining from time to time the qualifications of each elector whose name is entered upon the list of qualified voters, and shall not be limited or estopped by any action taken at any prior time. This section is taken from the Act of 1949, page 1221.

#### *Citizen and voter may challenge applicant for registration.*

Section 34-137 of the 1955 Supplement to the Code of Georgia provides that any citizen of the county who is registered and qualified voter shall be allowed to contest the right of registration of any person whose name appears upon the voters' list and for notice by the registrars to the voter. It also provides that the challenge shall specify the grounds upon which it is based, and copy of it shall be furnished to the challenged voter at least one day before passing upon same. This section is taken from the Act of 1949, (Georgia Laws 1949, p 1222).

#### *Consequence of failure to appear at time for hearing of challenge.*

Section 34-120 (4) provides that failure to appear at the time specified in any notice under this section or in any notice given in connection with any hearing under this law shall constitute cause for dismissing an application or of removing a voter's name from the list and the registrars shall enter an order to that effect. It also provides that no new application for registration shall be received from the applicant until after the beginning of the next calendar year. It further provides that the application may be reinstated on motion of applicant if he can prove that he was not in fact served with such notice or furnished with a notice. This section was taken from the Act of 1949, (Georgia Laws 1949, p 1211).

#### *Notice of denial of application to registrar.*

Section 34-120 (5) provides that when an order is entered denying an application or removing a voter's name from the voter's list notice shall be given to the applicant by mail on the day the order is issued at the address shown on the registration card. This section was taken from Section 20(5) of the Act of 1949, (Georgia Laws 1949, p 1212).

*Time for service of notices to be given by Registrars.*

Section 34-120 of the 1955 Supplement of the Code provides the time in which notices shall be served, that is not less than one day nor more than ten days after the date of the notice, and that they shall be mailed to applicant at the address given on his application card. It also provides that if the registrars are present when the application is filed, they may proceed with the examination of the applicant without notice.

The motions filed by the defendant were:

1. A motion for more definite statement of Plaintiff's petition.

2. A motion to strike I. J. White, F. J. Brown, Emma Dugger, Nancy Boyer and Pete Jones on account of the fact that they were not stricken by defendants, as Registrars of Pierce County, Georgia from the voting list of Pierce County as claimed by plaintiffs in their petition, but remained and now are on said voting list, and said plaintiffs, I. J. White, F. J. Brown, Emma Dugger actually voted in the Democratic Primary held in Pierce County, Georgia on August 15, 1956.

3. Motion to strike parts of complaint for the reason that the One Hundred Thirty-six (136) fellow Negro citizen whose interest herein being in common and similar to their own should be stricken and

also that the plaintiff had not exhausted his remedies at law.

These motions are granted for the purpose of filing and hearing of same, and are granted. The plaintiff filed amendments:

1. Motion to add names to the voting list as parties plaintiff after the case was closed. This motion was granted.

2. A motion that the laws under which the defendants were relying was unconstitutional being Act of Legislature approved February 25, 1949.

There was not any evidence or law submitted which would justify the Court in ruling that the Act of the Legislature approved February 25, 1949 is unconstitutional. This motion is therefore denied.

**JUDGMENT OF THE COURT**

Whereupon after carefully considering all the evidence offered in the hearing of the petition for injunction and applying thereto the principles of law which in the opinion of the court controls,

IT IS ORDERED, and adjudged by the Court that the prayers of plaintiffs for an injunction, as set forth in their petition be and the same is hereby refused and denied, and that the restraining order heretofore granted be and the same is hereby dissolved.

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## ELECTIONS

### Voting—Utah

Preston ALLEN, for himself and other American Indians similarly situated, v. Porter L. MERRELL, individually and as County Clerk, Duchesne County, Utah.

Supreme Court of Utah, December 29, 1956, 305 P.2d 490.

**SUMMARY:** An American Indian residing on a reservation in Utah brought a proceeding as a class action in the Utah Supreme Court against a Utah county clerk seeking to require the clerk to issue him a ballot and permit him to vote. The clerk's refusal to allow the petitioner to register and vote was based on a Utah statute which provides that residents of Indian reservations are not considered residents of Utah for voting purposes unless a prior

residence elsewhere in the state has been established. The petitioner contended that this provision was violative of his rights under Art. IV, Sec. 2 and the Fourteenth and Fifteenth Amendments to the Constitution. In an opinion issued on October 25, 1956, the court upheld the statutory proscription as valid. 1 Race Rel. L. Rep. 1067. On December 29, 1956, the court issued a supplemental opinion, holding that a separate classification of reservation Indians with an accompanying limitation of voting rights is based on reasonable grounds and is not a denial of the right to vote on racial grounds. [The United States Supreme Court has granted certiorari on this case, No. 534, November 5, 1956, 77 S.Ct. 134.]

#### CROCKETT, Justice.

Preston Allen, an American Indian residing on the Uintah Indian Reservation in Duchesne County, Utah, instituted original proceedings in this court, for himself and others similarly situated, seeking a writ to compel the defendant, Porter Merrell, County Clerk, to issue him a ballot and permit him to vote.

The refusal of the defendant, Merrell, to give plaintiff a ballot was based on the definition of "resident" as a qualification to vote contained in Par. 11, Sec. 20-2-14, U.C.A. 1953, which reads:

Any person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation.

It is plaintiff's contention that the above definition of "resident," in practical application, denies voting privileges only to Indians residing on reservations in contravention of the Fifteenth Amendment to the Federal Constitution which declares that the right of citizens to vote shall not be denied or abridged, ". . . on account of race, color, or previous condition of servitude"; that it offends against the equal protection clause of the Fourteenth Amendment;<sup>1</sup> and that it violates the privileges and immunities clauses of both Section 2 of Article IV<sup>2</sup> and the Fourteenth Amendment.<sup>3</sup>

1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Sec. 1, Amendment XIV, U. S. Constitution.
2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." Sec. 2, Art. IV, U.S. Constitution.
3. "No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States." Sec. 1, Amendment XIV, U. S. Constitution.

That Indians are entitled to the rights and privileges bestowed upon citizens by the Federal and State Constitutions, we do not question. But the right to vote is not vested absolutely in any citizen. Nor is it a right assured by the several clauses of the Federal Constitution referred to above.<sup>4</sup> The right derives from the state.<sup>5</sup> Our State Constitution itself grants the right to vote to "every citizen of the United States" over 21 who meets the residence requirements.<sup>6</sup> It is well settled that the right thus granted is subject to reasonable qualifications imposed by the state.<sup>7</sup>

Pursuant to its inherent power, our Legislature has chosen to prescribe that residence must be in this state other than on an Indian or military reservation as a prerequisite to voting, and it is the operation of that requirement upon the plaintiff which is the basis of contention in this action.

#### [Separation of Powers]

The challenge of the constitutionality of this statute focuses attention upon the fundamental principles underlying the relationship between the judicial and legislative departments of government.<sup>8</sup> In order that the separate responsibilities and functions of the departments of government may in fact, as well as in theory, be preserved, it is important that the court proceed with the utmost caution in reviewing legislative acts lest it encroach upon the prerogatives of the legislature. It is no wise within our province to pass upon the wisdom or the desirability of such enactments. If from an analysis of the entire situation there appears to be any reasonable basis for the requirements imposed by the

4. Pope v. Williams, 193 U.S. 621; Minor v. Happersett, 88 U.S. 162; Am. Jur. Con. Law, Sec. 466.
5. Pope v. Williams, 193 U.S. 621; United States v. Cruikshank, 92 U.S. 542.
6. Art. IV, Sec. 2, Utah Constitution.
7. Evans v. Reiser, 78 Utah 253, 2 P.2d 615; Breedlove v. Suttles, 302 U.S. 277.
8. Sec. 1, Art. V, Utah Constitution.

statute which is related to its purpose of establishing proper standards as a qualification for voting, the statute must be upheld.

In support of his position that the disqualification from voting is an arbitrary and unreasonable discrimination against Indians, plaintiff points to the fact that Indians are now, for all practical purposes, emancipated to full citizenship, and are to a substantial degree self-sustaining; that under presently existing law, reservation lands are politically as well as geographically within the state of Utah;<sup>9</sup> that Indians share many of the responsibilities of citizenship, such as the duty of military service;<sup>10</sup> and that they pay some taxes, such as estate taxes on personal property, on lands which are not exempted from taxation under acts of congress,<sup>11</sup> and taxes levied by the state on the production from, and improvements on mineral lands leased from the tribes.<sup>12</sup> Further, that they are to some extent subject to the jurisdiction of state courts; and being citizens residing within the state, they have an interest in legislation which affects Indians. Wherefore plaintiff reasons that they are entitled to all of the privileges of citizenship, including the right to vote for officials who make and administer the laws.

#### *[Status of Indians]*

These arguments make it desirable for us to take a comprehensive look at the status of Indians residing on reservations. We think a realistic analysis makes it manifest that there are three somewhat interrelated basic reasons which may be considered as providing a justification for the requirement that one must have established a residence in the state other than on an Indian reservation as a qualification to vote. They are: (1) That most persons residing on reservations are members of Indian tribes which have a considerable degree of sovereignty independent of state government; (2) That the Federal Government maintains a high degree of interest in and responsibility for their welfare and thus has potentially a substantial amount of influence and control over them, and (3) That they are much less concerned with paying taxes and otherwise being involved with state govern-

9. U. S. v. McBratney, 104 U.S. 621, New York ex rel Ray v. Martin, 326 U.S. 496.

10. Totus v. United States, 39 F.Supp. 7.

11. Oklahoma Tax Comm. v. United States, 319 U.S. 598.

12. 43 Stat. 244, 25 U.S.C., Sec. 398; 44 Stat. 1347.

ment and its local units, and are much less interested in it than are citizens generally.

The status of the American Indian and his relationship to our government has been unique and changing. Originally they seem to have been considered independent political sovereigns with the right of self-government.<sup>13</sup> Article I, Sec. 8, U. S. Constitution gives congress the power to "regulate commerce with foreign nations, . . . and with the Indian tribes," but it was early recognized that this concept was not entirely proper and that Indians living on reservations within the United States must of necessity have a different status than people of foreign countries. The realization that our government retained a degree of responsibility to them gave rise to the principle of guardianship.<sup>14</sup> However, Indians were not then regarded as citizens and consequently, the protection afforded citizens concerning their rights to vote by the Fifteenth Amendment and the Congressional Act implementing it<sup>15</sup> was held not to extend to them.<sup>16</sup>

The idea that Indian tribes on reservations within our country must be regarded in a very different light than foreign nations and that we had a high degree of responsibility for and common interest with them was further articulated in the act of 1871 which declared that the Indian tribes should no longer be recognized as independent nations.<sup>17</sup> Congress also then provided that individual Indians could receive lands in severalty which would be held in trust for them by the United States for a period of 25 years,<sup>18</sup> after which they would receive title, their wardship would then terminate and they would become citizens.<sup>19</sup> Since that time there has been much paternalistic federal legislation emanating from concern over their welfare premised upon the guardianship principle and governmental control over Indians. In recent years the trend has been toward complete elimination of governmental control and looking toward their full emancipation.

13. Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515.

14. McKay v. Campbell, 16 Fed. Cases 161; *ex parte* Reynolds, 20 Fed. Cases 582.

15. 16 Stat. 140, entitled "An Act to enforce the rights of citizens of the United States to vote in the several states of the Union, and for other purposes."

16. McKay v. Campbell, 16 Fed. Cases 161.

17. 16 Stat. 544.

18. e.g. At certain times, land has been partitioned to particular Indians and citizenship has been given to those who received the land. 17 Stat. 213.

19. 16 Stat. 544.

Citizenship was first granted to Indians generally by the act of 1924, which provided that: "all noncitizens Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States."<sup>20</sup> However, this act did not make it entirely clear whether all Indians born *after* that date were to be citizens. The act of 1940 was purposed to clarify the prior act to the effect that such was the Congressional intent.<sup>21</sup>

We are entirely in accord with the objective of having Indians endowed with all of the privileges of citizenship and fully participating in the privileges and responsibilities attendant thereupon. And such is the avowed policy of our Legislature express in the 1955 enactment of Sec. 55-2-35, which provides:

"It is declared to be the public policy of the state of Utah to cooperate with the secretary of interior, other governmental departments and agencies, and Indian tribes in developing plans for an orderly termination of federal supervision over the persons and property of Indians to the end that Indians may become self-sustaining."

Notwithstanding the desirability of that objective and the considerable amount of legislation which has been proposed toward it, it cannot realistically be claimed that it has been attained, even in theory, much less so in fact. To assume that it has been accomplished because we might wish it so, would be to blind ourselves to reality.

#### *[Degree of Autonomy]*

The Indian tribes have not entirely lost their character as sovereign entities, but retain a substantial degree of autonomy under which they may and do operate independent of state government. They have the power to adopt a constitution, enact tribal laws to which members of the tribe are subject, to prevent the sale or alienation of tribal lands, and to negotiate with federal, state and local governments.<sup>22</sup> They also have the power to tax,<sup>23</sup> to employ counsel and to prosecute actions for the tribe.<sup>24</sup> As recent as March 6, 1956, the U. S. Court of

Appeal for the Eighth Circuit in the case of *Ironcrow v. Oglala Sioux Tribe of Pine Ridge Reservation* stated, "We hold that the Indian tribes, such as the defendant Oglala Sioux of the Pine Ridge Reservation, South Dakota, still possess their inherent sovereignty excepting only where it has been specifically taken from them either by treaty or by congressional act."<sup>25</sup>

#### *[Relationship to Federal Government]*

The possibility of influence and control over persons residing on military and Indian reservations by the federal officials appears to have been an important factor motivating the passage of the questioned statute originally. That potential yet exists to a considerable extent. That Indians sustain a different relationship to the federal government than do other citizens is so patent that the contrary could not seriously be contended. They are still subject to much legislation peculiar to them.<sup>26</sup> Although in some areas allotments of reservation lands have been made to individual Indians, the title is still held in trust by the government, and neither it nor livestock furnished by the government can be sold without consent of the federal officer in charge of the tribe. Indians are restrained from transferring such property. Any deed given contrary to this prohibition is void,<sup>27</sup> and it is a crime to purchase such personal property without such consent.<sup>28</sup> The period of trust on Indian lands and the restrictions on alienation has been extended from time to time and recently has been extended indefinitely.<sup>29</sup> The reservation lands upon which they reside and from which they derive their living are not subject to taxation, and neither is their personal property which is furnished them by the Federal Government. In contrast to this, taxes upon the holdings of other citizens, particularly real estate taxes, are of prime importance to the county and state governments because they provide a large part of the operating revenues.

The Indian Service under the Department of the Interior exercises supervisory control over the Indians' use of their lands and business transacted with them generally. Federal agencies also undertake to provide for their various needs, including schools and health services.

20. 43 Stat. 253, 8 U.S.C., Sec. 3.

21. 54 Stat. 1137, 1138; 8 U.S.C.A. 1401.

22. 48 Stat. 987, 25 U.S.C.A. 476 (1955 Supp.).

23. *Iron Crow v. Oglala Sioux of Pine Ridge Reservation*, 231 F.2d 89.

24. *Makah Indian Tribe et al. v. McCaully et al.*, 39 F.Supp. 75; *Sampson et al. v. Brennan et al.*, 39 F.Supp. 74.

25. 231 F.2d 89.

26. Title 25 U.S.C.A.; 18 U.S.C.A. Chapter 53.

27. *Taylor v. Brown*, 40 N.W. 525.

28. 18 U.S.C.A. 1157.

29. 25 U.S.C.A. 462.

It maintains jurisdiction on reservations under Federal law with respect to the ten most common major crimes and assumes the responsibility of enforcing and prosecution for violations.<sup>30</sup> Congress has now by legislative act given the states the right to assume criminal and civil jurisdiction,<sup>31</sup> but the act did not expressly relinquish Federal jurisdiction, and Utah has not adopted an act assuming it.

*[Political Activity of Indians]*

It is not subject to dispute that Indians living on reservations are extremely limited in their contact with state government and its units and, for this reason also, have much less interest in or concern with it than do other citizens. It is a matter of common knowledge that all except a minimal percentage of reservations Indians live, not in communities, but in individual dwellings or hogans remotely isolated from others and from contact with the outside world. Though such a state is certainly not without its favorable aspects, they have practically no access to newspapers, telephones, radio or television; a very high percentage of them are illiterate;<sup>32</sup> and they do not speak English but in their dealings with others and even in their tribal courts, use only their native Indian languages. Under such conditions it is but natural that they are neither acquainted with the processes of government, nor conversant with activities of the outside world generally. Inasmuch as most governmental services are furnished them, it is patent that they would not have much concern with services and regulations pertaining to sanitation, business, licensing, school facilities, law enforcement and other functions carried on by the county and state governments. This is more especially so because they are not obliged to pay most of the taxes which support such governmental functions.

It is thus plain to be seen that in a county where the Indian population would amount to a substantial proportion of the citizenry, or may even outnumber the other inhabitants, allowing them to vote might place substantial control of the county government and the expenditures of

30. Murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny. 18 U.S.C.A. 1153.

31. 67 Stat. 588, 28 U.S.C. Sec. 1360 (1953 Supp.)

32. Utah has no literacy requirement. This observation relates only to their present general character of life.

its funds in a group of citizens who, as a class, had an extremely limited interest in its functions and very little responsibility in providing the financial support thereof.

There is nothing in the statute which prevents an Indian from becoming qualified to vote the same way as any other citizen. All he has to do is to establish a residence in a part of the county where his living is not both supervised and subsidized by the Federal Government; where he foregoes the paternalistic favors there conferred, and where he assumes his responsibilities as a citizen by living on lands where he pays taxes, either directly or through his rent, and otherwise removes the detachment and lack of interest in the affairs of the state which surrounds him on the reservation.

From the considerations hereinabove discussed, it is obvious that reservation Indians, as a class, occupy a distinctly different status in their relationship to government than do other citizens. This conclusion is based upon their remaining tribal sovereignty; the influence and control, actual and potential, of the Federal Government over them; the fact that they enjoy the benefits of governmental services without bearing commensurate tax burden, and are not as conversant with nor as interested in government as other citizens. It appears to us that this provides a reasonable basis for the classification made and for the requirement that residence in the state must be other than on an Indian reservation as a qualification to vote.

Consequently, we do not see how it can be said with any degree of certainty that the statute is a denial of the right to vote on account of race, nor that it is so unreasonable or arbitrary that it is in clear conflict with the nondiscrimination and equal protection clauses of the Federal Constitution or of the Constitution of this state. Under the well established rule that all doubts must be resolved in favor of validity and no legislative act declared unconstitutional unless it is clearly and palpably so,<sup>33</sup> we decline to declare this act invalid.

The writ sought by the plaintiff is denied. No costs awarded.

WE CONCUR: McDonough, Chief Justice, and Henriod, and Wade, Justices.  
Worthen, J. concurs in the result.

33. Parkinson v. Watson, 4 Utah 2d 191, 291 P.2d 400; Newcomb v. Ogden City Public Schools, 121 Utah 503, 243 P.2d 941.

**TRIAL PROCEDURE****Argument of Counsel—California****PEOPLE of the State of California v. Charles LINSON**

Supreme Court of California, In Bank, November 27, 1956, 303 P.2d 537.

**SUMMARY:** The defendant, a Negro, was convicted of second degree burglary in a California state court. He moved for a new trial on the ground, among others, that the prosecuting attorney had used improper and prejudicial argument to the jury in stating that the defendant had been identified by a witness who was a member of his own race. On appeal of the denial of the motion for a new trial, the California Supreme Court affirmed, holding that the argument to the jury was not prejudicial to the defendant. A portion of the opinion, by CARTER, J., follows:

\* \* \*

Defendant argues that the district attorney was guilty of using "prejudice" in that he argued defendant's prior convictions to the jury. He also argues that his race was used against him in that the district attorney "was guilty of misconduct by his remarks to the jury in his closing argument that this was not a case where the *white* man made the identification, but the identification was made by the *Negro*, one of his own kind, this misconduct comes within the rule of People v. Simon, 80 Cal.App. 675 [252 P. 758, 759]." (Emphasis that of the defendant.) The Simon case is not at all like the one under consideration. There, the defendant, who was of the Jewish race, was charged with wilfully burning insured property with intent to defraud the insurers. The district attorney there argued that "There has, of course, grown up a suspicion in this country with reference to fires whenever a Jew has anything to do with it. \* \* \* There were several other references to

Jews having burned insured buildings in order to collect the insurance. The portion of the district attorney's argument of which defendant complains reads as follows: "I would also call this to your attention, and maybe this is my own particular brand of mountain folklore, but I am always more convinced if I have persons of a particular race identify their own kind. I don't know whether it is true or not that a member of the negro race is more apt to identify, and with more certainty, a fellow member of his race than not, but here you do have that case where Mr. Holloway identifies a member of his race, and I think the defendant, in good conscience, would admit he has some distinctive features. The other lady identifies him positively." In the case at bar, the jury saw the defendant and the witnesses and if they were of the Negro race that fact must have been obvious with reference thereto. It does not appear, however, how this statement could have prejudiced defendant.

\* \* \*

**TRIAL PROCEDURE****Petit Juries—Arkansas****Frank Andrew PAYNE v. STATE of Arkansas**

Supreme Court of Arkansas, November 5, 1956, 295 S.W.2d 312.

**SUMMARY:** The appellant, a Negro, was tried and convicted of murder in an Arkansas state court and sentenced to death. On appeal to the Arkansas Supreme Court he assigned as error the denial of his motion to quash the jury panel. This motion had been made on grounds that he had been denied equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution because there had been no Negroes on the jury commission which selected the panel of persons eligible for the petit jury and because there was discrimination against Negroes in the selection of that panel. The court rejected the con-

tention of discrimination as to the jury commission. As to discrimination in selection of the jury panel, the court held that there was no showing of systematic exclusion of Negroes from jury duty and that a showing of non-proportional representation of Negroes on petit jury panels was not sufficient to sustain the charge of discrimination. The case was affirmed.

WARD, Associate Justice.

Appellant, Frank Andrew Payne, was charged by information with the murder of J. M. Robertson on October 4, 1955. A jury found him guilty of murder in the first degree and fixed his punishment at death by electrocution. For a reversal, appellant sets forth a number of objections and alleged errors in his Motion for New Trial. We have given careful consideration to each one of the above assignments, some of which will be disposed summarily, but we will discuss hereafter in some detail only those assignments of error which appear to have merit and those upon which appellant places the greatest emphasis.

The trial court overruled appellant's motion to quash the information, and two grounds are here relied on to show error.

(a) It is contended by appellant that Amendment No. 21 to the Constitution of this State, substituting an information by the prosecuting attorney for an indictment by the grand jury, violates the 5th and 14th Amendments to our Federal Constitution. This question has already been passed on contrary to appellant's contention (as submitted by appellant) in the case of *Penton v. State*, 194 Ark. 503, 109 S.W.2d 131 and affirmed in *Smith & Parker v. State*, 194 Ark. 141, 109 S.W.2d 131. We now assert, as was stated in the latter mentioned case in referring to the former mentioned case, that: "There is no reason at this time to re-examine and re-state our conclusions reached in the case above. That opinion is controlling on this case."

(b) Notwithstanding the above, appellant makes the further contention that the information in this case should have been quashed because it is undisputed that it was issued before there had been a preliminary hearing. In support of this contention appellant apparently relies on Ark. Stats. § 43-806 which provides that when a defendant has been held to answer at a preliminary examination the prosecuting attorney may file an information. The section referred to is a part of Act 160 of the Acts of 1937 which was passed to implement Amendment No. 21 referred to above and was not meant to be a limitation on the powers granted by the amend-

ment. This court definitely settled the question against appellant's contention in the *Penton* case, supra, at page 513 of the Arkansas Reports, where it was stated:

"The principle distinction between provisions of § 1 of Amendment 22 to the Constitution of Arkansas, and the provision of California's Constitution authorizing prosecutions under information, is that as a condition precedent to the validity of prosecutions on information in California, there must have been examination and commitment by a magistrate. Omission of this requirement from the Arkansas Amendment does not deprive the accused of the rights of due process guaranteed under the Constitution of the United States."

Our amendment No. 21 (referred to above as 22) says nothing about a preliminary hearing.

#### [Admission of Confession]

It is ably and earnestly insisted that the trial court erred in admitting in evidence a confession made and signed by appellant. This argument is based on the contention that appellant was mistreated and that he was induced by fear and intimidation to make the confession. After careful consideration we are unable to agree with appellant.

Robertson was killed about 6:00 P. M. on Tuesday, October 4, 1955, and appellant was arrested the next morning and placed in the city jail at Pine Bluff. He was taken early the next morning, October 6th, to Little Rock for a lie detector test and was returned to Pine Bluff that afternoon and replaced in the city jail. The next day, October 7th, at about 1:00 P. M. he was taken to the county jail and his confession was made, signed and witnessed at about 2:00 P. M. Later that same afternoon he was taken, presumptively for security purposes, to the county jail at Dumas where he spent the night but was returned to Pine Bluff on the following morning. On examination appellant testified that he was not given anything to eat, that his clothes were taken away from him, that (in effect) he was threatened with the result of mob violence

if he did not confess and that some of his relatives were arrested. He stated that while in the jail at Dumas he was reminded of the fate of a Negro boy in Mississippi. We here note that appellant was a Negro, 19 years of age.

A great deal of testimony was taken relative to the alleged threats and mistreatment, and the circumstances attending the confession. A careful consideration of this testimony convinces us that the confession was properly allowed in evidence. Several witnesses were present when the confession was made and they all testified that, at no time, were there any threats or any mistreatment of the appellant. In the confession itself appellant states that he was not in any way mistreated. The State Police Sergeant who took appellant to Little Rock admits that they took his shoes and socks off before they left Pine Bluff and that they removed his pants and shirt after he arrived at Little Rock, all for the purpose of laboratory examinations. The sheriff admits that shortly before the confession was actually given he merely informed appellant that there were several people outside the jail. His explanation was that the appellant had already indicated he wanted to make a confession and the sheriff thought it would be better to have the confession made in private, having in mind the safety of appellant. Any statement that might have been made to appellant while in jail at Dumas could not have influenced his confession which had already been made the day before. Before the trial court decided to admit appellant's confession in evidence he heard voluminous testimony, in chambers, from all of the officers and people who had been in contact with appellant during his period of confinement before the confession was made. All of them deny that appellant was mistreated in any way or that he was in any way threatened. This procedure was approved in McClellan v. State, 203 Ark. 386, 156 S.W.2d 800, and we are convinced that the confession was properly introduced in evidence. It is true that some of the appellant's relatives were arrested soon after he was taken into custody but, as explained, this was done in an effort to prevent the money which appellant was supposed to have taken from the deceased from being disposed of.

While Sergeant Buck Halsell was on the stand the prosecuting attorney asked this question. "Sergeant Halsell, I believe you stated that you were active in the investigation of the murder of J. M. Robertson. A. That's right." The attor-

ney for appellant objected to the question on the ground that "it hasn't been established there was a murder yet." The prosecuting attorney replied that "I believe it was established in his opening statement." The court then instructed the attorneys to go ahead and there were no further objections. We are not convinced that this incident materially prejudiced the rights of appellant or that it calls for a reversal. It is reasonable to suppose that the jury understood that the prosecuting attorney was merely asking the witness if he had been active in the investigation of the death of Robertson.

After the State had rested its case late in the afternoon the court recessed for 5 minutes in order to take up some motions presented by the defendant. After this was done the attorney for appellant made this statement:

**"Mr. Branton:** The defendant at this time notes that it is a quarter of five and the defendant requests that the Court recess until tomorrow morning to allow the defense attorney time to consult with his client and further prepare for the defense of the defendant in this case.

**The Court:** I think we ought to finish this testimony this evening if we can—if we can't, well, all right; I think you are entitled to a few minutes, but not the rest of the day and tonight.

**Mr. Mullis:** If the Court please, I object to that motion—I would like to get the testimony in for this reason, there are several witnesses here now who are being held and are holding up another Court.

**The Court:** The Court is familiar with that. If you want a few minutes we will get out and let you have your client and let you do what you want to, but I think we should finish this testimony this afternoon, this afternoon or tonight, if we can.

**Mr. Branton:** I would like a few minutes.

**The Court:** I rule we are going to finish the testimony if we can.

**Mr. Branton:** I object to the ruling of the Court as to the recess."

Under this state of the record we see no error in the court's refusal to grant a recess until the following day. It will be noted that appellant's

attorney gave no special reason for asking the court to adjourn other than to consult with his client and further prepare for his defense. It was not stated or shown in what way appellant would be prejudiced by the Court's refusal to grant the recess. This court in the case of *Edwards v. State*, 171 Ark. 778, 286 S. W. 935, held that it was not error for the court to refuse a postponement of a trial for a few hours until some of defendant's witnesses should arrive, where the defendant had announced ready for trial without such witnesses being present.

*[Separation of Jurors]*

After both sides had rested, but before the case was submitted to the jury, late in the afternoon the court permitted the jurors to separate and go to their several homes. It is objected by appellant that this was error although he admits that it is a matter of discretion with the court. Ark. Stats. § 43-2121 specifically provides: "The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate . . ." In *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054, this court said: "Permitting the jury in a murder case to separate before the case was finally submitted to them is not reversible error where no prejudice is shown." It is not disputed that no such prejudice is shown here.

In this connection it is also contended that the court did not properly admonish the jury before they separated, but we think no reversible error appears. This contention is based on Ark. Stats. § 43-2122 which provides that before each adjournment the jury must be admonished by the court "that it is their duty not to permit any one to speak to or communicate with them on any subject connected with the trial . . ." In this instance the court stated to the jury: "Remember, don't discuss the case and don't permit anyone to discuss it with you; . . ." It was not until after the jury had left the court room that appellant made any objection. It was only then that appellant's attorney made this statement: "For the record I want to object to the jury being permitted to separate for the night." We think the admonition given by the court was a substantial compliance with the statute. The record shows that the court had previously, on occasion of adjournment in this case, given the jury a full and complete admonition, and he started this one with the word "remember." If appellant

thought the admonition given by the court was not sufficient, he should have so indicated at the time.

*[Motion for Acquittal]*

At the close of all of the testimony appellant made a motion for directed verdict of not guilty which was overruled by the trial court and this is assigned as reversible error. In this connection the argument is made that the evidence is not sufficient to support the verdict of the jury. There is not merit in this contention.

We have already concluded that appellant's confession was properly introduced in testimony. In this confession he admitted that he took an iron rod and hit the deceased over the head and knocked him to the floor and then hit him several more times, and then he took money out of the cash drawer. Even without this confession there is much evidence to support the jury's verdict. Evan Reed, an employee of the deceased at the Bluff City Lumber Company, testified that he left the company office about 5:30 P. M. on the day Robertson was killed, and that the deceased and appellant were the only ones there when he left. He returned 10 or 15 minutes after 6 o'clock and found Robertson lying on the floor dead or dying. In a short while the officers found some of appellant's clothes at his residence located at 805 Birch Street with blood stains on them. Appellant pointed out to a witness where he got the metal rod and where he placed it after he had struck the deceased. When the officers took appellant to his home, appellant told them where they would find the money. He stated that it was hidden in a piano and upon searching the piano the officers found \$444. The evidence shows that this was approximately the amount which the deceased had in his office at the time. There can be no question we think, about the sufficiency of the testimony to support the jury's verdict of murder in the first degree.

*[Jury Discrimination]*

Discrimination. The point which appellant stresses forcibly and ably, and which merits the closest scrutiny, is that the Negro race was discriminated against in the selection of the jury panel which tried him. His motion to quash the jury panel, and testimony supporting the same, mentions two grounds upon which error is predicated in the court's refusal to grant his motion; (a) discrimination against his race in

the selection of jury commissioners, and (b) discrimination in the selection of the jury panel.

(a) There is no merit in appellant's contention that no Negroes were selected as jury commissioners at the term previous to the one at which he was tried, or for many years previous thereto. This question was decided by this court against appellant's contention in the case of *Maxwell v. State*, 217 Ark. 691, 232 S. W. 2d 982. At page 694 of the Arkansas Reports we said: "Appellant further contends that he was discriminated against within the meaning of the 14th Amendment because there were no Negroes on the jury commission. We know of no rule making this requirement and the suggestion must be rejected."

#### [*Jury Panel*]

(b) In support of appellant's contention that his race was discriminated against in the selection of the jury panel which tried him, substantially the following facts were disclosed: Prior to 1947 and for many years no Negroes had been placed on the regular panels of the petit jury; Since 1947 29 Negroes had served as regular members of the petit jury during which years there were three panels on which no Negroes served and the most that served any one year was 6; Approximately 30 per cent of the qualified electors in Jefferson County are Negroes. In addition to this, testimony of the jury commissioners who selected the panel of jurors for the term at which appellant was tried was introduced. One commissioner stated he felt that he should not select any one for the jury that he did not know and that he was limited in his knowledge of the people whom he was trying to select. He further stated: "I have lived in this county for 57 years; I think I would be as well qualified to select either white or black as anybody else." "Q. Do you know very many Negroes who would be qualified for jury service? A. I think so." It appears that he actually recommended one of the two Negroes who was selected on the panel. The second commissioner stated that he knew quite a few colored people and that he had been doing business with them quite awhile although he knew that all of them would not be qualified or eligible for jury service. The third commissioner stated that he felt that there should be some Negroes on the panel but hadn't given

any thought as to whether they should be selected on a proportional basis.

The argument is advanced that the above factual situation makes a *prima facie* showing of racial discrimination for many years previous to the date of the trial, citing the case of *Green v. State*, 222 Ark. 222, 258 S. W. 2d 56. We do not agree. In the Green case it was shown that no Negro had been selected on the regular jury panel for the past 30 years, but that is not the situation here. It is shown by the testimony that the 29 Negroes who had actually served on the jury panel since 1947 did not include all the Negroes who had been selected for service. On the other hand it was shown that many others, the number undisclosed, had been selected but had not served for different reasons. The burden therefore was not on the State but on the appellant to introduce testimony showing discrimination.

#### [*Discrimination Not Shown*]

We think the testimony tending to show discrimination in the case under consideration is weaker to sustain appellant's contention than that shown in the case of *Washington v. State*, 213 Ark. 218, 210 S. W. 2d 307, where the court held that no discrimination existed. The cited case came to us from Jefferson County where it was tried in 1947 as a time when no Negroes had previously been selected for jury service. In holding that there was no discrimination the court at page 223 of the Arkansas Reports, had this to say:

"But the proof in this record shows that the three Negroes were members of the regular panel of petit jurors called in the present case. They were V. T. Price, R. D. Doggett and Prince Swaizer. They were members of the regular panel, and numbered 7, 10 and 12 in the examination of jurors for trial in this case. There is no evidence even tending to show that the jury commissioners selected these three Negroes or any other members of the jury panel for any purpose other than to truly comply with the law of the land."

Based on the testimony of the jury commissioners mentioned above appellant strongly insists that this case is controlled by *Cassell v. Texas*, 339 U. S. 282 and should therefore be reversed. Here again we are unable to agree

with appellant's contention, because we think the two cases are distinguishable on the facts. In the Cassell case at page 287 the court makes clear the basis of its decision where it stated: "Our holding that there was discrimination in selection of the grand jurors in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on the grand jury list, the commissioners said that they knew none available who qualified; at the same time they said they chose jurymen only from those people with whom they were personally acquainted." The court further said, at page 290, "The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes . . . is discrimination in violation of petitioner's constitutional rights." In the case under consideration no such lack of knowledge is shown.

We have given careful consideration to the other objections, not discussed above, raised by appellant and find no ground for reversal in

any of them. Appellant objected to the introduction of photographs which were shown to the jury on a screen but this was a matter which rested largely in the discretion of the trial judge and we find no abuse of that discretion in this case. The same thing can be said in answer to appellant's objection to the introduction in evidence of certain articles of clothing and the iron rod heretofore mentioned. Appellant stated that he was not allowed a public trial because several Negroes were not allowed to enter the court room. Following an objection by appellant's attorney in this connection the trial judge stated that he saw no vacant seats and overruled the objection. In the absence of testimony to the contrary we must assume that the trial judge was correct and that he did not abuse his discretion.

Finding no reversible error the judgment of the trial court is affirmed.

Affirmed.

## TRIAL PROCEDURE

### Petit Juries—Tennessee

#### **Gerard ROSENTHAL v. STATE of Tennessee**

Supreme Court of Tennessee, June 8, 1956, 292 S.W.2d 1.

**SUMMARY:** The defendant was tried and convicted of murder in a Tennessee state court. On appeal to the Tennessee Supreme Court he assigned as error, among other grounds, that one member of the petit jury which tried him had expressed a prejudice against Jews. The court found that each member of the jury panel had denied any prejudice against Jews on the voir dire examination and that the ruling by the trial judge on this question on motion for new trial was therefore supported by material evidence. The conviction was affirmed. [The United States Supreme Court has denied certiorari in this case, No. 453, December 3, 1956, 352 U. S. . . ., 77 S.Ct. 222.] A portion of the opinion of the Tennessee Supreme Court, by SWEPSTON, J., follows:

\* \* \*

The seventh assignment of error is based solely upon the affidavit of one juror to the effect that another juror, whose name he did not know and whom he could not otherwise identify, had stated in the presence of the affiant that owing to the prejudice he held against Jews, he was going to try to lean over backwards in the case. It appears that on the voir dire examination each and every juror, when asked about prej-

udice against Jews, stated that he was not so prejudiced.

This Court is requested to reverse this case on the theory that the defendant did not have a fair and impartial trial guaranteed to him by the Constitution of this State. It will be readily conceded by everyone that an accused person is entitled to be tried by a jury of unbiased and impartial jurors. However, we have this situation. One juror out of 12 makes oath that some

other juror whom he was unable to identify has admitted his prejudice against Jews. It must be assumed that if any other juror had heard the statement that such would have been made to appear by affidavit and by putting the juror on the stand for cross-examination. It is also settled by the case of Rader v. State, 73 Tenn. 610, that any juror who is accused of bias or prejudice is entitled to take the stand for the purpose of refuting such a charge. Here, the affiant is unable to name or identify this mysterious Mr. X and to give him an opportunity to affirm, deny or explain whatever statement he may have made.

The law is well settled that upon a motion for a new trial the findings of the Trial Judge are entitled to the weight of the verdict of the jury and will not be disturbed where there is material evidence to support his finding. Thomas v. State, 109 Tenn. 684, 75 S.W. 1025, which is cited in Lindsey v. State, 189 Tenn. 355, 225 S.W.2d 533, 15 A.L.R.2d 527.

The Trial Judge had before him the response of each juror on the voir dire examination that he had no prejudice against Jews. This is material evidence to support the finding of the Trial Judge and we, therefore, will not reverse. The assignment is overruled.

• • •

## CORPORATIONS NAACP—Alabama

**Ex Parte NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE  
[In re: State of ALABAMA ex rel. PATTERSON, Attorney General, v. NAACP]**

Supreme Court of Alabama, December 6, 1956, 91 So.2d 214.

**SUMMARY:** The Attorney General of Alabama brought suit in an Alabama state court seeking an injunction to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws concerning registration as a foreign corporation. A temporary restraining order was issued against the Association. 1 Race Rel. L. Rep. 707. Later the State filed a motion for the production of certain books, papers and other documents, including a membership list of the Association. Against objection the court ordered the production of the documents. On refusal of the Association to produce the documentary evidence, the court adjudged the Association in contempt and assessed a fine of \$10,000 against it, to be raised to \$100,000 if the order was not complied with in five days. 1 Race Rel. L. Rep. 917. The Alabama Supreme Court denied a petition for writ of certiorari to review the contempt order. 1 Race Rel. L. Rep. 919. Upon the refusal of the Association to produce the demanded documents within the five-day grace period, the trial court decreed that the fine be raised to the higher figure. The Association again petitioned the Alabama Supreme Court for a writ of certiorari to review this action of the trial court. Holding that the trial court had jurisdiction and acted within its civil contempt powers, the court refused to grant the writ and dismissed the petition.

### PER CURIAM

The Circuit Court ordered the petitioner to bring certain books, documents and papers into court on a certain date for inspection by the State of Alabama in a cause filed by the Attorney General on behalf of the State against the petitioner. On the date set to produce, the court granted the petitioner eight additional days within which to comply with its order.

Thereafter the court offered the petitioner ad-

ditional time to produce the documents. In reply to the court's offer to grant additional time, counsel for petitioner stated in open court that additional time would not be required, that the petitioner would not produce the books, documents, and papers as ordered by the court and that it elected to stand on its decision not to bring the papers into court for inspection by the State.

As a result of petitioner's brazen defiance of the order of the court, the petitioner was adjudged in contempt of court and fined \$10,000.00. The decree provided that in the event the petitioner failed to comply fully with the order to produce within five days from that date that the fine for contempt would be raised to \$100,000.00.

On the last day that petitioner had to comply with the court's order or suffer the fine to be raised for refusing to comply, the petitioner offered to bring some of the documents into court, but refused to fully comply with the order to produce. This offer of partial compliance by the petitioner was not accepted by the court. Thereafter the court decreed that the fine be raised as indicated above.

This petition for writ of certiorari presents the single question, viz: The legality vel non of the order of contempt.

The ultimate aim and purpose of the litigation is to determine the right of the state to enjoin petitioners from doing business in Alabama. That question, however, is not before us in this proceeding.

#### [Review Limited]

On the petition for certiorari the sole and only reviewable order or decree is that which adjudges the petitioner to be in contempt. Certiorari cannot be made a substitute for an appeal or other method of review. Certiorari lies to review an order or judgment of contempt for the reason that there is no other method of review in such a case.—*Ex parte Dickens*, 162 Ala. 272, 50 So. 218. Review on certiorari is limited to those questions of law which go to the validity of the order or judgment of contempt, among which are the jurisdiction of the court, its authority to make the decree or order, violation of which resulted in the judgment of contempt. It is only where the court lacked jurisdiction of the proceeding, or where on the face of it the order disobeyed was void, or where procedural requirements with respect to citation for contempt and the like were not observed, or where the fact of contempt is not sustained, that the order or judgment will be quashed.

It is well to remember that "a proceeding for contempt is not a part of the main case, before the court, but is collateral to it, a proceeding in itself." *Ex parte Dickens*, *supra*. In the process of the trial in the main case there are ample

remedies for review. Appeal lies from interlocutory decrees, such as those on demurrer to the bill, orders granting, or refusing temporary injunctions, orders sustaining or denying motions to dissolve or discharge.—Tit. 7, §§754, 1057, Code of 1940.

An order requiring defendant to produce evidence in a pending cause may be reviewed on petition for mandamus.—*Ex Parte Hart*, 240 Ala. 642, 200 So. 783. Hence, if petitioner felt itself aggrieved by the order requiring it to produce certain evidence, it should have sought to have the order reviewed by mandamus. Where a party to a cause elects not to avail of such remedies to test the validity of an order requiring him to do or refrain from doing a certain act and simply ignores or openly declines to obey the order of the court, he necessarily assumes the consequences of his defiance, and is remitted to the lone hope of having the reviewing court find and declare the order of contempt void on its face. That is the status of petitioner here.

Here we do not have before us a decree on the equity of the bill, or a final decree granting relief to complainant, or, in fact, the decree granting a temporary injunction. All that we have presented to us is the order adjudging the petitioner to be in contempt, and as we will show that order is well sustained.

So, were the sanctions imposed upon petitioner for its willful contempt committed in the presence of the court within the court's lawful authority? We will first inquire whether the contempt in the instant case is in its nature civil or criminal.

#### [Nature of Contempt]

We approved the following definition of a civil contempt in *Ex parte Dickens*, *supra*.

"A 'civil contempt' consists in failing to do something ordered to be done by a court in a civil action, for the benefit of the opposing party therein."—162 Ala. 276.

The distinction between civil and criminal contempts is thus stated in 12 Am. Jur., Contempt, §6, p. 392:

"Criminal contempt proceedings are those brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders. Civil contempt proceedings are those instituted to preserve and enforce the rights of private

parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are those individuals for the enforcement of whose private rights and remedies the suits were instituted."

Criminal and civil contempts are defined in 17 C.J.S., Contempt, §§5 and 6, pp. 7, 8, to be as follows:

"A criminal contempt is conduct that is directed against the dignity and authority of the court, or a judge acting judicially; it is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect.

"Civil contempt consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein, and is, therefore, an offense against the party in whose behalf the violated order is made. If, however, the contempt consists in doing a forbidden act, injurious to the opposite party, the contempt may be considered criminal."

We indicated our approval of both of the above quotations in *Ex parte King*, 263 Ala. 487, 491, 83 So. 2d 241, 245.

We held the contempt to be criminal in the *King* case at page 490 because it was "• • • punishment for what has been done, and it committed petitioner to jail for a definite period of time." We further stated at page 491, "It seems to us that the penalty is for past disobedience rather than to compel obedience."—*Ex parte King*, supra.

We also held the contempt to be criminal in *Ex parte Hill*, 229 Ala. 501, 158 So. 531, for the same reasons.

The petitioner insists that its contempt was criminal because the trial court used the word punishment in the decree. The Supreme Court in *United States v. United Mine Workers of America*, 330 U.S. 258, 297, n. 64, 67 S. Ct. 677, 91 L. Ed. 884, speaking of the use of the word punishment as indicating the type of contempt

said: "'punishment' has been said to be the magic word indicating a proceeding in criminal, rather than civil contempt. • • • But 'punishment' as used in contempt cases is ambiguous. It is not the fact of punishment but rather its character and purpose. . . .—*Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1941)." There were two fines in the *United Mine Workers of America* Case. The fine assessed for past contumacy was held to be for criminal contempt; and the fine to coerce the union into future compliance with the court's order was held to be for civil contempt.

In the light of these principles it is clear to us that the fines in the instant case were for civil contempt. The decree adjudging the \$10,000.00 fine said:

"Ordered, adjudged and decreed further that in the event the respondent fully complies with the court's order to produce within five days from this date, then it *may move to have this fine reduced or set aside*. However, in the event the respondent fails to comply fully with the order to produce within five days from this date, then it is ordered, adjudged and decreed that the fine for this contempt be \$100,000.00." (Emph. sup.)

The \$10,000.00 fine was coercive because it gave the petitioner a right to have the fine set aside after full compliance with the order to produce. The \$100,000.00 fine was coercive because the petitioner had five days within which to comply with the court's order or to be fined said amount. Neither fine apparently was severe enough or the petitioner would have produced the documents within the time allowed instead of offering partial compliance with the court's order on the last day of grace.

#### [Similar Case]

The time given the petitioner in the instant case prior to assessing the larger fine was the same time given the union by the Supreme Court of the United States in modifying the civil contempt fine in the *United Mine Workers of America* case, supra. We quote from page 305:

"• • • to pay a fine of \$700,000, and further to pay an additional fine of \$2,800,000 unless the defendant union, *within five days*

after the issuance of the mandate herein, shows that it has fully complied . . .  
(Emph. sup.)

Our statutes limit punishment for contempt by the circuit court to five days in jail and a fine of fifty dollars.—Title 13, §§9 and 143, Code of 1940. But our cases hold that the statutory limitations apply to criminal contempt and not to civil contempt.—*Ex parte King*, *supra*; *Ex parte Hill*, *supra*; *Ex parte Dickens*, 162 Ala. 272, 50 So. 218.

The amount of the fine in the instant case, not being limited by statute, is within the sound discretion of the court and in the absence of an abuse thereof will not be disturbed.—*MacInnis v. United States*, C.A. Cal. 191 F.2d 157, 342 U.S. 953, 96 L. Ed. 708 cert. denied 72 S. Ct. 628; *United States v. Landes*, C.C.A. N.Y., 97 F.2d 378; *Ex parte Hill*, *supra*. The fine adjudged by the circuit court is not excessive.

#### [Merits of Order]

We could well conclude here by ordering a denial of the writ and a dismissal of the petition, but will discuss briefly the merits of the order to produce so that the parties may know the views entertained by the court.

The petitioner argues that its belated offer to produce included everything except items number 2 and 8 as set out in its brief, and that it was not required to produce these. Items 2 and 8 are:

“2. All lists, documents, books, and papers, addresses and dues paid of all present members in the State of Alabama of the National Association for the Advancement of Colored People, Incorporated.  
\* \* \*

“8. All lists, books, papers showing the names and addresses of all officers, agents, servants and employees in the State of Alabama of the National Association for the Advancement of Colored People, Inc.”

Assuming that the petitioner did offer to bring in for inspection by the State everything except the documents listed in items 2 and 8, could the court require the petitioner to disclose this information? We think so. The court held the information to be competent and relevant; and the petition shows that the court had jurisdiction of the petitioner and of the subject matter.

This court in holding that an officer of the Ku Klux Klan, Inc. was in contempt of court for failing to turn over a list of members of said organization when ordered to do so by the court, said:

“The first duty of every citizen is allegiance to the constitution and laws of the state and nation and the lawful judgments and decrees of the courts. . . Only privileged communications and facts made so by the law or lawful government regulations are protected from disclosure. The identity of the membership of said organization does not fall within such privileged class.”—*Ex parte Morris*, 252 Ala. 551, 554, 42 So. 2d 17.

The Supreme Court of the United States recently upheld a contempt citation of a labor union official, for his failure to produce before a grand jury, union records “showing its collections of work-permit fees, including the amounts paid therefor and the *identity of the payors*. . . .” (Emph. sup.). The court said at page 705:

“The union and its officers acting in their official capacity lack the privilege at all times of insulating the union’s books and records against reasonable demands of governmental authorities.”—*United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542.

The courts, when their jurisdiction is duly invoked, have authority to exercise visitatorial powers and inquire as to the acts of such corporations as the petitioner and keep them within the bounds of their lawful authority.—*Essgee Co. of China v. United States*, 262 U.S. 151, 43 S. Ct. 514, 67 L. Ed. 917; *In re Verser-Clay Co.*, 10 Cir., 98 F.2d 859, 120 A.L.R. 1098; *Wilson v. United States*, 221 U.S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912 D, 558; *Ex parte Morris*, *supra*.

The guaranties found in the Federal and State Constitutions against compulsory self-incrimination do not extend to a private corporation so as to justify it in refusing, on the ground that it might be thereby incriminated, to comply with a lawful order directing it to produce corporate records in legal proceedings.—*United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542; *Wilson v. United States*, *supra*; *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct.

870, 50 L. Ed. 652; United States v. Lawn, S.D.N.Y., 115 F.Supp. 674.

It is clear, therefore, that the circuit court, in equity, had authority to order the petitioner to disclose names, addresses and dues paid by petitioner's members, officers, agents, and em-

ployees and that the petitioner could be held in contempt of court for non-compliance with the court's order to produce.

Writ denied and petition dismissed.

All the Justices concur.

## CORPORATIONS NAACP—Georgia

**T. V. WILLIAMS, as Revenue Commissioner of the State of Georgia v. The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE et al.**

Fulton Superior Court, Atlanta Judicial Circuit, Georgia, December 14, 1956, No. A-58654.

**SUMMARY:** The Revenue Commissioner of the state of Georgia made a demand on the National Association for the Advancement of Colored People and certain of the Association's officers and employees in Atlanta, Georgia, for the production of certain books, papers and other records. The demand was for the purpose of assessing the tax liability of the Association for several past years. The demand was refused and an order was obtained in a Georgia state court for the production of the papers. Upon a further refusal to produce the papers, the Commissioner filed a petition for citation of contempt against the Association and named individuals. The court found the Association and some of the individual respondents in contempt. In a further order, time for producing certain of the papers was extended, one of the individual respondents was given a suspended sentence and the Association fined \$25,000 with provision for remission of part of the fine upon a further showing.

PYE, J.

### ORDER

On November 21, 1956, T. V. Williams, as Revenue Commissioner of the State of Georgia, presented to the Court a sworn petition and application under the Revenue Laws, Code, Section 92-3214. This petition alleged that The National Association for the Advancement of Colored People, a corporation organized under the laws of the State of New York, having an office and place of business at 204 Auburn Avenue, N.E., Atlanta, Fulton County, Georgia, maintaining a bank account in a named bank, and also having records, documents and other papers stored at 859½ Hunter Street, N.W., had never filed any income tax returns in this State and had never filed application for tax-exempt status. It set forth that on that day, during regular business hours, the Commissioner had made written demand on said corporation to produce its books, records and data for inspection for the purpose of determining whether said corporation should be required to file income tax returns under the

laws of this State. It was alleged that said written demand had been then and there refused; that the production of said books and other data was within the power of the duly authorized agents and employees of said corporation; and that petitioner was informed and believed, and so alleged, that unless the Court required the production of said books, records and data for inspection instanter, the same would be concealed and removed beyond the jurisdiction of the Court.

Upon said petition the Court entered an order which, after recitation of facts alleged, concluded in the following language: "It is hereby ordered that the National Association for the Advancement of Colored People, a corporation organized under the laws of New York, and its duly authorized officers, agents and employees, to-wit: John C. Calhoun, D. W. Hodges, L. D. Milton, Mrs. Eunice Cooper, D. L. Hollowell and Mrs. Ruby Hurley, produce the said books, records and other data in their individual possession or control instanter for the inspection by T. V. Williams, Revenue Com-

missioner of Georgia or any of his duly authorized agents."

By the recitation preceding the quoted language of said order, the words, "said books, records and other data" were stated to refer to, "All books, records, and other data bearing on the said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business during the taxable years 1947 through 1955."

[*Citation for Contempt Sought*]

Later on the same day the Commissioner presented to the Court a petition for citation for alleged contempts arising out of alleged refusal to obey the Court's said order. Upon this petition rule nisi issued, directed to the respondents named therein, to-wit: The National Association for the Advancement of Colored People, John C. Calhoun, D. W. Hodges, Mrs. Eunice Cooper, L. D. Milton and D. L. Hollowell, requiring said respondents to show cause before the Court why they had not complied with said order, and to show cause also why they should not be attached for contempt in failing to comply therewith. By said order said corporation and said individuals were also enjoined from removing all records, books and other data of said corporation or its affiliates, chapters or branches from their respective premises at 204 Auburn Avenue, N. E., and at 859½ Hunter Street, N. W., or otherwise concealing and disposing thereof.

On November 27, 1956, the Commissioner presented to the Court a petition for citation for alleged contempt against Mrs. Ruby Hurley, and rule nisi issued thereon directed to her, requiring her to show cause why she should not be held in contempt for refusal to comply with said order. At the same time the Court enjoined her from removing all records, books and other data of said corporation or its affiliates, chapters or branches from her possession, custody or control or otherwise concealing or disposing thereof.

Said rules nisi came on to be heard before the Court in regular order on December 6, 1956, and upon his motion, following a previous order of the Court entered December 3, 1956, the matter was continued as to respondent D. L. Hollowell, and nothing contained in this order now entered applies to this respondent.

Thereafter on December 6, 1956, said corpo-

ration and the other individual respondents, to-wit: John C. Calhoun, D. W. Hodges, Mrs. Eunice Cooper, L. D. Milton and Mrs. Ruby Hurley, filed separate motions to dismiss and separate responses. After the overruling of the several motions to dismiss, the case proceeded before the Court on said December 6, and thereafter on December 7, 10, 11 and 12.

[*Order of Court*]

Now, therefore, the evidence in said matter and argument having been fully heard, the Court makes the following order in respect of the several alleged contempts before it for determination as to said corporation and as to said individual respondents, John C. Calhoun, D. W. Hodges, Mrs. Eunice Cooper, L. D. Milton and Mrs. Ruby Hurley:

By said order of November 21, 1956, there was reduced to an enforceable order of Court the obligation which the law imposes upon corporations to produce their books and records for inspection by the Revenue Commissioner or his duly authorized agents. By this order said corporation was required immediately to produce for inspection its corporate books, records and other data therein referred to, namely, those which were in the possession or control of the named individuals. By said order each of the individuals named was required as an individual to make like production for inspection. If an individual had no such corporate books, records or data in his possession or control the order did not require anything of him. But if he did have in his individual possession or control any such book or record or any such data, it was his duty forthwith and immediately to produce the same to be inspected. This duty and obligation arose in respect of the corporation either upon service of the order upon it or upon notice to it of the existence of the order. This obligation and duty was imposed upon each of the individuals named in the order either upon service of the order upon him or notice to him of the existence of the order.

[*Nature of Business Immaterial*]

Under the law and under this order of the Court, the nature of the corporate business was immaterial. Likewise, it was immaterial whether the corporation might or might not at some time claim or obtain exemption from the payment of

taxes. But it is proper to say that the undisputed evidence showed that said corporation had never made any tax returns to the State, had no tax-exempt status under the laws of the State, and had never made any application for such status.

Respondents John H. (John C.) Calhoun, V. W. (D. W.) Hodges, L. D. Milton and Mrs. Eunice Cooper contend that they are not officers, agents or employees of said corporation, but of the Atlanta Branch, National Association for the Advancement of Colored People, which they contend is not a branch office of said corporation, but an autonomous organization of individuals, and that they have never had in their possession or control any books, records or data of said corporation.

But the evidence in the case shows to the contrary. The evidence shows, and the Court holds, that said Atlanta Branch is a branch office of said corporation, and that said individuals are corporate agents. Indeed, said corporation registered on June 19, 1956, in the Office of the Secretary of State as a foreign corporation, and stated in its registration that its principal office was 20 West 40th Street in the City and State of New York, and that its principal office in Georgia was at 204 Auburn Avenue, Northeast, in the City of Atlanta, which office is that place at which the respondent John H. (John C.) Calhoun, when being confronted with the Court's said order, refused to permit the duly authorized agents of the Revenue Commissioner to inspect the books, records and data which were then and there in said office and in his immediate possession and control.

#### *Respondent Milton*

The evidence shows, and the Court finds, that respondent L. D. Milton was verbally notified of said order the night of its passage, said order having been served on him by leaving same with John H. (John C.) Calhoun at said 204 Auburn Avenue, Northeast. The evidence further shows that said respondent L. D. Milton had in his control at said time one check book of said Atlanta Branch, National Association for the Advancement of Colored People, containing stubs and unused checks; and vouchers of said Atlanta Branch, National Association for the Advancement of Colored People, said vouchers being the authority of the said respondent as Treasurer of said Branch to draw checks upon the bank account of said Branch as provided for

by said vouchers; and it is ordered that the said respondent L. D. Milton submit these documents to inspection by T. V. Williams, Revenue Commissioner of Georgia, or any of his duly authorized agents, between the hours of 9:00 A. M. and 5:00 P. M., Atlanta time, on Monday, December 17, 1956, at said respondent's bank on Auburn Avenue in the City of Atlanta, and said corporation is likewise so ordered, following which the Court will enter an appropriate order.

#### *Respondent Hodges*

The evidence shows, and the Court finds, that respondent V. W. (D. W.) Hodges was verbally notified of said order sometime after same had been served upon him by leaving same with said John H. (John C.) Calhoun at said corporate office. The evidence is insufficient to show to the satisfaction of the Court that at that time said respondent had or thereafter said respondent has had in his individual possession or control any of said books, records or other data; and this respondent is therefore acquitted and discharged.

#### *Respondent Cooper*

The evidence shows, and the Court finds, that respondent Mrs. Eunice Cooper was verbally notified of said order sometime after same had been served upon her by leaving same with said John H. (John C.) Calhoun at said corporate office. The evidence is insufficient to show to the satisfaction of the Court that at that time respondent had or thereafter said respondent has had in her individual possession or control any of said books, records or other data; and this respondent is therefore acquitted and discharged.

#### *Respondent Hurley*

The evidence shows, and the Court finds, that when the Court's said order was presented to the respondent Mrs. Ruby Hurley at 859½ Hunter Street, N. W., Atlanta, Georgia, she permitted the duly authorized agents of said Revenue Commissioner to inspect the Georgia file of said corporation then and there in her immediate individual possession and control, which said respondent in good faith believed to be the only books, records or data called for in said order, this respondent believing, as the Court finds, that other books, records and data bearing upon said corporation's income, disbursements and ex-

penses, in relation to other States, was not called for by said order. The said order, however, was not so limited, and the Court directs said respondent Mrs. Ruby Hurley to produce all books, records and other data of said corporation kept, located or stored at said 859½ Hunter Street, Northwest, Atlanta, Fulton County, Georgia, for the inspection of T. V. Williams, Revenue Commissioner of Georgia, or any of his duly authorized agents, between the hours of 9:00 A. M. and 5:00 P. M., Atlanta time, on Tuesday, December 18, 1956, at said 859½ Hunter Street, and said corporation is likewise so ordered, following which the Court will enter a further appropriate order in respect of said respondent.

#### *Respondent Calhoun*

The evidence shows, and the Court finds, that the respondent John H. (John C.) Calhoun refused to obey the said order when the same was presented to him on November 21, 1956, in that he at said time, as an agent of said corporation, had in his immediate individual possession and control books, records and other data of the Atlanta Branch of said corporation, at the office of said Branch at 204 Auburn Avenue, Northeast, Atlanta, Fulton County, Georgia, which he could have submitted them and there for the inspection of the duly authorized agent of said Revenue Commissioner, who was then and there on the premises for the purpose of inspecting the same pursuant to said order of the Court. The evidence shows, and the Court finds, that said respondent John H. (John C.) Calhoun was then and there in wilful contempt of said order and that he has continued in such contempt from time to time and from day to day thereafter, and now is in contempt thereof. The Court orders the said respondent John H. (John C.) Calhoun to be committed to the common jail, there to remain in the custody of the Sheriff, without bail or mainprize, until he shall cause the said order of the Court to be complied with by causing to be produced for the inspection of T. V. Williams, Revenue Commissioner of Georgia, or any of his duly authorized agents, on the premises at 204 Auburn Avenue, Northeast, Atlanta, Fulton County, Georgia, during regular office hours as kept by said Revenue Commissioner, the books, records and other data of said Atlanta Branch of said corporation which were in the immediate possession, custody and control of said respondent on the 21st day of November,

1956, when he was served with said order; and that thereafter, and to be computed from the date of his compliance herewith, the said respondent John H. (John C.) Calhoun serve 12 months in the common jail, which sentence, however, we now suspend so long as he behaves himself, and in our judgment and discretion.

#### *Respondent Corporation*

The evidence shows, and the Court finds, that the National Association for the Advancement of Colored People, a corporation organized under the laws of New York, was guilty of wilful contempt in the respects above stated as to respondent John H. (John C.) Calhoun, and that such contempt has continued from time to time and from day to day thereafter, and that said corporation is now in wilful contempt. It appears that the Revenue Commissioner is undertaking to compile information in respect of any tax liability of said corporation to this State for the calendar years 1947 through 1955, and that all the books, records and other data bearing on the said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business, whether conducted in or without this State during said taxable years, are necessary in order to compile said information. It appears to the Court that the Revenue Commissioner has been put to expense and probably will be put to additional expense in connection with compiling said information, and it also appears to the Court that said corporation should be punished for its wilful disobedience of said order. It is ordered that said National Association for the Advancement of Colored People, a corporation organized under the laws of New York, produce all its books, records and other data bearing on the said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business during said taxable years wherever said business was transacted, whether within or without this State (except such as may be otherwise theretofore produced hereunder) for the inspection of said Revenue Commissioner of Georgia, or any of his duly authorized agents, in its said branch office, 204 Auburn Avenue, Atlanta, Georgia, within thirty-five days hereafter, and from day to day thereafter, Saturdays and Sundays excepted, until said books, records and data shall have been fully inspected. It is further ordered that said corporation forthwith pay into

the Registry of the Clerk of this Court a fine of Twenty-five Thousand Dollars, to be hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books, records and data hereby ordered, to reduce the amount

of said fine if such should be just under the circumstances then existing.

The Court reserves jurisdiction to make such further orders in this matter as may hereafter from time to time appear appropriate.

This 14th day of December, 1956.

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## CORPORATIONS NAACP—Louisiana

### State of LOUISIANA ex rel. Jack P. F. GREMILLION, Attorney General v. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Court of Appeal of Louisiana, First Circuit, November 26, 1956, — So.2d —.

**SUMMARY:** The State of Louisiana, on the relation of the state attorney general, brought suit in a state court against the National Association for the Advancement of Colored People and individual officers and members thereof in Louisiana. The suit sought an injunction against the Association and its officers and members in Louisiana restraining them from conducting any activities as such Association in that state because of failure to comply with Louisiana statutory requirements regarding registration and filing of membership lists. Following an initial hearing a preliminary injunction was issued. On default of appearance of the defendants at the hearing on the final decree, judgment was entered against the defendants and the injunction made final. *Sub nom. Louisiana ex rel. LeBlanc v. Lewis*, 1 Race Rel. L. Rep. 571 (1956). Prior to the initial hearing by the Louisiana state court in this case steps had been taken by the Association to effect a removal of the case to the federal district court. Following further action by the state court the Association and other defendants brought an action in federal district court for an injunction against further proceedings in the state court. The district court observed that, where a case is actually removed to a federal court, the state court is enjoined by operation of law from further proceedings, but declined to grant the injunction sought pending the completion of any review procedure in the state courts or federal appellate courts. *Lewis v. Louisiana ex rel. LeBlanc*, 1 Race Rel. L. Rep. 576 (E. D. La. 1956). On appeal of the state court case to the Louisiana Court of Appeal, First Circuit, that court held that the case had been effectively removed to the federal district court and that the state court had been thereby divested of jurisdiction. Further, the appellate court held itself to be without authority to entertain the appeal.

#### ELLIS, J.

Suit was brought on March 1st, 1956 against appellant Association (and also individually against members of its Board of Directors and Executive Committee) on the relation of the Attorney General pursuant to LSA-R.S. 12:401, 405, seeking a temporary and a permanent injunction to enjoin defendant Association and its officers from conducting any business in the state and dissolving defendant Association in Louisiana.

The hearing on the preliminary injunction was held on March 29th, 1956, and an injunction

issued against defendant Association in accordance with the prayer of the petition herein. The suit was dismissed as against the co-defendant individuals, officers of defendant Association.

Defendant Association appeals, and its sole contention is that the preliminary injunction issued on March 29th, 1956, and all proceedings in State court subsequent thereto are null and void, since the cause was removed to the United States District Court, Eastern District of Louisiana, on March 28th, 1956, pursuant to and in accordance with Title 28, United States Code, Section 1446, which provides:

"Procedure for removal.—(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceedings is based, or within twenty days after the service of summons upon the defendant if such is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, *which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.*

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its

writ of habeas corpus, and the marshall shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the Clerk of such State court. (June 25, 1948, c. 646, § 1, 62 Stat. 939; May 24, 1949, c. 139, § 83, 63 Stat. 101.)" (Emphasis added)

Defendant Association filed a copy of federal court "petition for removal" in the 19th Judicial District Court of Louisiana on March 28th, 1949, at 3:40 P.M. together with a copy of a written notice of said removal directed to petitioner of same date.

When the preliminary injunction came up for hearing on the following day, on March 29th, 1956, defendant Association objected to further proceedings since the petition for removal had been filed in the United States District Court within twenty days of service and since written notice was given to petitioner of said removal. Under 28 USCA 1446 (e), it is urged, this has effected removal of this cause to the federal court and the "State court(s) shall proceed no further unless and until the case is remanded."

#### [*Removal Ineffective, Urged*]

The State urged that the removal was ineffective for several reasons (such as that actions to which the State is a party may not be removed to federal courts, and that the written notice was ineffective since placed in the Attorney General's box rather than given to him personally), and relied upon *Patterson v. State*, \_\_\_ Ala. \_\_\_, 175 So. 371, and similar cases, which held that, although removal of a cause from State to Federal court is a matter of right, nevertheless the state court has the right and the power to examine the application for removal and to ascertain whether it complies with the Federal removal statute, and to retain jurisdiction in the event of non-compliance. This was under the old Sections 72, 74 and 75 of Title 28, USCA.

However, the law is clear that such jurisprudence has been superceded by Congressional enactment in 1948 and 1949, which pertinently provided the text of Section 1446, Title 28, above quoted in full. The effect of the change summarized by the Supreme Court of Idaho in *Hopson v. North American Insurance Company*, 71 Idaho 461, 233 P.2d 799, 25 ALR2d 1040, at 233 P.2d 802, 25 ALR2d 1044-5, as follows:

"By providing in Section 1446 that taking such procedural steps effects the removal of the cause to the Federal Court, which is not found in the earlier Act, Congress has thereby expressly effected the removal of the cause to the Federal Court irrespective of the ultimate determination of the question as to whether or not is removal; it is not thereafter in the State court for any purpose until and unless the cause is remanded; Under Sec. 72 the removal was never accomplished unless it was a cause removable; under the present Act removal is accomplished and jurisdiction attaches in the Federal Court even though it may be subsequently determined that it should be and is thereafter remanded. Removability is no longer a criterion which gives or denies validity to the proceedings in the State court while a petition for removal to the Federal Court is pending; any such proceedings in the State court under the present act are not sanctioned; they are prohibited.

"Apparently to overcome the endless and multiple litigation and resulting severe hardships which arose under Section 72 as construed, the amendment was prompted not only for the purpose of removing from the State court the authority in any event to pass upon the question of removability, but also for the purpose of effectuating the removal by following all the statutory steps as effectively as if the cause had originally been filed in the Federal Court, thus voiding any further proceedings in the State court until and unless the cause is remanded.

"We hold that under 28 USCA § 1446, a case is removed from the jurisdiction of the State court upon a compliance with the procedural steps therein set forth for all purposes until and unless it is subsequently remanded to such State court; that until and unless the case is remanded no valid proceedings can be taken in the State court at any time following the filing of such petition and bond and giving notice thereof to all adverse parties and filing a copy of the petition with the Clerk of the State court; furthermore, that any action so taken in the State court thereafter and prior to remanding the cause to such State court, will have no force or effect."

In the Hopson case, a default was taken following the filing of the petition for removal to the federal court. The federal court remanded the case to the State court, and on the following day the defendant moved to vacate the default entered against it in the interim between the filing of the removal petition in federal court and the remand of the proceedings to State court by the federal court. The Supreme Court of Idaho affirmed the district court's order setting aside and vacating as void default so taken.

Likewise, the Supreme Court of Mississippi very recently in *Bean v. Clark*, Miss., 85 So.2d 588, vacated a judgment entered against defendant who had filed a removal petition in Federal court and a copy thereof in State court, holding that "the filing of the petition and bond by the non-resident defendant for a removal of the cause to the United States District Court, effected the removal of the entire cause and that no further proceedings could thereafter be had in the circuit court where the suit had been filed, unless and until the cause is remanded by the Federal Court to the State Court," 85 So.2d 589.

#### [Other Cases]

To the same effect is *State ex rel. Allis-Chalmers Mfg. Co. v. Boone Circuit Court*, Ind., 86 N.E. 2d 74, *Allen v. Hatchett*, 91 Ga. App. 571, 86 S.E. 2d 662; and we have been cited to no contrary authority.

Likewise, "The question whether a civil action is removable and had been properly removed is one for the consideration of the federal court and is not controlled by State law (cases cited)", *Stoll v. Hawkeye Casualty Company of Des Moines, Iowa*, 186 F.2d 96, 22 ALR2d 899, at 904.

"Questions of law as well as issues of fact raised upon a petition for removal must be tried and determined by the Federal Court. Kansas City, etc., R. Co. v. Daugherty, 138 U.S. 298, 303, 11 S.Ct. 306, 34 L.Ed. 963," *Hamilton v. Hayes Freight Lines, Inc.* 102 F.Supp. 594 at 596.

In disposing of contentions that the Tennessee state courts were competent to determine controverted issues of fact upon which the validity of the removal to federal court depended, the United States Supreme Court stated, "It is thoroughly settled that issues of fact (as to the validity of the removal) must be tried in the

circuit court of the United States. *Crehone v. Railroad Co.*, 131 U.S. 240, 9 Sup.Ct.Rep. 692; *Railway Co. v. Dunn*, 122 U.S. 513, 7 Sup.Ct.Rep. 1262; *Carson v. Hyatt*, 118 U.S. 279, 6 Sup.Ct.Rep. 1050," Kansas City Ft. S. & M. R. Co. v. Daugherty, 138 U.S. 298, 11 S.Ct. 306 at 307. See *Stone v. South Carolina*, 117 U.S. 430, 6 Sup.Ct. 799; see also: *Metropolitan Casualty Ins. Company v. Stevens*, 312 U.S. 563, 61 S.Ct. 715; *Chesapeake & Ohio Railway Company v. McCabe*, 213 U.S. 207, 29 S.Ct. 430; *Madisonville Traction Company v. St. Bernard Mining Company*, 196 U.S. 239, 25 S.Ct. 251.

#### [*Jurisdiction Lacking*]

These cases are authority for the proposition that, even before the 1948 and 1949 Congressional enactments presently found as Section 1446, Title 28 United States Code, State courts were without jurisdiction to determine controverted issues of fact with regard to the validity of the removal, when the removal petition was valid upon its face; which issues only the Federal court to which the cause was removed had jurisdiction to pass upon, usually in a motion to remand the cause to State court. "The rule is that, when the right of removal depends upon the existence of certain facts, they must be determined by the federal court, which alone can determine controverted issues of facts on which the right to removal depends. It is the duty of the State court, in such case, to defer all action until such issues have been passed upon by the federal court. The state court must accept as true all allegations of fact in the petition for removal (cases cited)", *Frazier v. Hines*, 260 Fed. 874 at 878.

#### [*Moore's Commentary*]

It seems clear that the changes effected by 28 USCA 1441-1447 were dictated in large part by a desire to avoid unseemly conflicts between state and federal jurisdiction. In this connection Professor Moore states:

"Under the Code every petition for removal is to be filed in the district court of the United States 'for the district and division within which' the state action is pending. Accordingly the above alternatives which were open to a defendant where his

petition had to be initially filed in the state court are no longer open. The seeds of conflict of jurisdiction between the federal and the state court have been largely destroyed. It should, therefore, be held that when removal has been fully effected, pursuant to § 1446 (e) hereafter discussed, the state court completely lacks jurisdiction to proceed further unless and until the case is remanded." *Moore's Commentary on the U.S. Judicial Code* 272 (1949).

"A very important change has been made in removal procedure. The former practice set up diverse procedures; and particularly under it some petitions for removal had to be first presented to the state court, others to the federal district court. The Code provides a uniform procedure for all removed cases, and in all cases the petition goes initially to the federal district court. After a petition for removal and bond are filed with the district court, the defendant or defendants shall then 'give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court.' This effects the removal 'and the State court shall proceed no further therein' unless and until the case is remanded. Under this latter provision it can properly be held that the state court is deprived of jurisdiction after removal is effected, until, in the case of a remand, jurisdiction is subsequently restored to the State court. This view would eliminate some of the Jurisdictional and procedural difficulties engendered by the former practice." *Moore's Commentary on the U.S. Judicial Code* 216-217 (1949).

"Upon, or promptly after, 'the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court'. On fulfillment of these requirements removal is effected, and § 1446 (e) commands that 'the State court shall proceed no further unless and until the case is remanded.' While the federal court may properly issue an injunction to prevent further proceedings in the state court, even in the absence of such an injunction § 1446 (e) should be held to operate as a statutory stay upon state court proceedings. Any further proceedings in the state court would

be a nullity, unless the defendant thereafter appeared and contested the right of the state court to proceed further." Moore's Commentary on the U.S. Judicial Code 276-277 (1949).

Thus the State courts—in this instance the 19th Judicial District Court and this appellate tribunal—were divested of further jurisdiction of this cause as of March 28, 1956 when the procedural requirements of Section 1446, Title 28 (removal petition and bond filed in federal court; copy thereof in State court and written notice to opposing party) were complied with necessary for removal to the federal court. The United States District Court for the Eastern District of Louisiana, in which this removal petition was filed, alone is competent to determine whether this removal is valid.

It follows, and has been consistently held

by the jurisprudence above cited, that the effect of the removal renders null and void any action thereafter taken in the State court, in this instance the 19th Judicial District Court. It also prevents this court from specifically decreeing such nullity, as we are and were by the removal divested of jurisdiction herein. We have no right to entertain this appeal. The parties must proceed in the federal district court, and the question as to whether the removal was proper must be decided by that court on proper motion to remand this cause to the State court.

Having been divested of jurisdiction by the removal, the 19th Judicial District Court was without authority to grant an order of appeal to this court, and this court for the same reason is without authority to entertain this appeal.

Appeal dismissed.

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## ALIENS Immigration—Federal Statutes

**UNITED STATES ex rel. LEE KUM HOY et al. v. Edward J. SHAUGHNESSY, District Director.**

United States District Court, Southern District, New York, August 8, 1955, 133 F. Supp. 850.

**SUMMARY:** Chinese seeking admission to the United States as citizens by virtue of being the children of United States citizens were denied admission and detained by the Immigration and Naturalization Service. The denial of admission was based, in part, on the results of blood tests conducted on the purported citizen father and the persons seeking admission which negated paternity. The Chinese sought a writ of habeas corpus in federal district court, alleging, in part, that the use of blood tests by the Service was confined solely to Chinese and was thus discriminatory. On the first hearing of the case the court held that the Chinese had been denied due process of law through denial by the Board of Special Inquiry of opportunities for them to challenge the results of the blood tests. 115 F.Supp. 302 (1953). Following further hearings the Board again denied admission to the Chinese. The petition for habeas corpus was renewed. At this trial the court held that the use of blood tests was not, in itself, a denial of due process, but would be so if the tests were administered solely to Chinese. The court ordered the writ sustained unless a further hearing was held by the Board on the question of possible discriminatory application of blood tests. 123 F.Supp. 674, 1 Race Rel. L. Rep. 225 (1954). A further hearing by a Special Inquiry Officer was conducted at which it was determined that discrimination was not practiced. This finding was sustained by the Board of Immigration Appeals. The petition for habeas corpus was again renewed before the federal district court. At this trial the court found that the practice of requiring blood tests to establish paternity of persons claiming derivative citizenship was applied only to Chinese and that the petitioners, but for the fact that they were

**Chinese, would have been admitted on the other proofs adduced. The court issued the writ. [On appeal the United States Court of Appeals for the Second Circuit reversed, see below.]**

**DIMOCK, District Judge.**

Respondent has submitted a form of order dismissing a writ of habeas corpus. The writ was originally sued out to attack respondent's right to hold three children of the Chinese race born in China who had been excluded from the United States. They had claimed American citizenship by virtue of one Lee Ha whom they claimed as their father. The Board of Special Inquiry, largely on the basis of blood tests held to preclude paternity, rejected their claim and they were taken in custody pursuant to that determination. I held that relators had been wrongfully denied opportunities to attack the blood tests and directed that the writ should be sustained unless the hearings were reopened in order to afford relators those opportunities. United States ex rel. Lee Kum Hoy v. Shaughnessy, D.C., 115 F.Supp. 302. The hearings were reopened and relators were afforded the opportunities to which they were entitled. The Board of Special Inquiry reached the same result as it had on the earlier hearing and its determination was sustained by the Board of Immigration Appeals. Following the decision of the Board of Immigration Appeals respondent sought, before me, a dismissal of the writ. On that occasion, the second time that the matter was before me, relators claimed: first, that the mere requirement of a blood test was a denial of due process of law and, second, that blood tests were actually used only in cases of persons of the Chinese race and that this limitation of the use of the tests constituted such a discrimination as to deny these relators due process of law. I held that relators' first point was unfounded but that "[i]f the facts established a deliberate use of the blood test technique to exclude Chinese and admit others similarly qualified except for race, the discrimination would clearly be unconstitutional" and I stated that the writ would be sustained unless the hearing before the Board of Special Inquiry were reopened "for the purpose of (a) the introduction of evidence with respect to the requirement of blood grouping tests in the cases of persons of the Chinese race and the omission to require blood grouping tests under similar circumstances in the cases of persons of other races and (b) the determination, upon such

evidence, of the issue of discrimination." United States ex rel. Lee Kum Hoy v. Shaughnessy, D.C., 123 F.Supp. 674, 678. Following the decision the hearings were reopened. Relators sought from me a direction that documents on the subject of discrimination be produced before the Special Inquiry Officer. I held it beyond my power to grant the application. United States ex rel. Lee Kum Hoy v. Shaughnessy, D.C., 16 F.R.D. 558. The Special Inquiry Officer found, as a fact, that "there was no discrimination at the time these applicants sought admission to the United States in 1952", and reached the same result as before. His determination was affirmed by the Board of Immigration Appeals. The case is now before me, for the third time, on respondent's application for an order dismissing the writ.

The issue of discrimination has been thrown into such bold relief in the case and relators have made such extraordinary efforts to get into the record all that the Government possessed on the subject, that I am justified in determining that issue upon that record.

**[Policy of Service]**

It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person had been subjected to a blood test or a Chinese excused from one.

In July of 1953, when charges of racial discrimination against the Chinese in blood tests were first made in relators' application for a writ of habeas corpus, the government denied that Chinese were singled out for such tests and claimed that blood tests were required in all cases where there were no birth certificates or other documents of identity. Thus, in the Government brief, it was stated that blood tests were not imposed upon Chinese persons alone, but upon "all persons attempting to enter the United States without birth certificates and similar documents". Similar statements were contained in several subsequent government affidavits to the effect that blood tests were required only

in those cases where there was an absence of birth certificates and other documentary evidence of identity.

In answering this argument of the government, relators cited two cases where Chinese persons were blood tested notwithstanding the fact that they had birth certificates. This was noted by me in my decision at 123 F.Supp. 674, 677, *supra*, where I said that these two cases lent substance to the claim that Chinese, regardless of the availability of birth certificates or other documents, were always subjected to a blood test while other persons never were.

In the reopened hearing following that decision, the Immigration Bureau witness sought to minimize the importance of birth certificates in determining whether a blood test was necessary, stating that it was "only one of the many criteria" for determining whether a blood test was needed in a particular case. According to the witness there are three common patterns of children of American citizens born abroad who apply for admittance to the United States as citizens. The first involves an American child in an "American colony" abroad, whose parents keep in close touch with the Consulate, and where the births and marriages would be registered at the Consulate. The second pattern, which, like the first, is not the usual pattern for Chinese children, would be where the American parent is not known to the Consulate, but where birth and marriage certificates are produced to substantiate the claim and, most important, the children involved are born in an area where the Consul could speedily conduct an investigation and ascertain from neighbors, friends and local government officials, the true identity of the child.

#### [*Necessity for Tests*]

In the foregoing two patterns of cases, the witness stated "there would be no need for using blood test evidence to verify an obvious relationship". The third type of situation was one which he said was typical of Chinese. This was where the child was born in the remote interior of China, where no birth or marriage certificates were kept, and, most important of all, the claimed area of birth was inaccessible to the Consul and hence where he could not conduct any investigation as to the circumstances of the child's birth. The witness then concluded and reaffirmed on cross examination that the most

important factor in determining whether a blood test would be required is whether a child is born in an area where the American Consul can readily conduct an investigation. He said that, if the Consul could verify the identity of the child involved from his investigation, by talking to neighbors, friends and local officials, there would be no need for a blood test.

Although the witness testified that the most important criterion for determining the necessity of a blood test—namely, the ability of the consulate to investigate the area of a person's birth—had been a factor in immigration investigations which antedated by a long time the use of blood tests, he admitted that, in the government brief filed when this case was first argued, there was no mention at all of this "most important" criterion. Similarly, in the subsequent government affidavits filed prior to the issuance of my decision, the Immigration Service had stated specifically that blood tests were required in cases where there were no birth certificates or documentary evidence, and there was no mention whatsoever of the feasibility of a consular investigation as being determinative of whether blood tests were necessary.

#### [*Other Proofs Available*]

To show that Chinese persons claiming a right to enter the country as children of United States citizens are always required to submit to blood tests, irrespective of how satisfactory their other proof as to identity was and regardless of whether they were born in an area where a consular investigation was possible, relators cited several cases as examples.

Exhibit No. 27 involved L-L the son of L-H, an American citizen of Chinese descent. L-L was born in Hong Kong, and produced a contemporaneous official birth certificate issued by the British government to prove his identity. This certificate stated the names of his parents and the place and date of his birth. In addition, the parents of L-L, having been married in Hong Kong, produced a marriage certificate. Most important, the son and mother were living in Hong Kong, and an investigation by the American Consul there was thoroughly feasible, and in fact conducted. Nevertheless, L-L, a child only a year and a half old at the time, was subjected to a blood test along with his father and mother.

Exhibit No. 28, involves Ng Ho Gim, an

American citizen of Chinese descent, who petitioned for his six year old son who was living in Hong Kong with his mother. His son was born in Hong Kong and his birth was registered at the American Consulate which issued a certificate verifying the birth of the child and the marriage of the parents. Notwithstanding the American Consulate's own certificate acknowledging the identity of the child and the fact of his parents' marriage, and in spite of the fact that the child was living in Hong Kong, thus making a thorough investigation possible, a blood test was still demanded of the parents and the child.

Exhibit No. 29 involves a naturalized American citizen of Chinese descent who married a Chinese alien woman in Hong Kong who subsequently gave birth to a child there. In a petition to bring his son over, the citizen submitted a contemporaneous birth certificate issued by the British government for his son, and his marriage certificate, also issued by the British government. In addition, the son and wife were living in Hong Kong where an investigation was feasible. But most important there were prior records of the wife and son at the American Consulate and the Consul had been for a long time cognizant of the family relationship of the individuals. Nevertheless, a blood test was required of all the parties.

Exhibit No. 30 involves an American citizen of Chinese descent who married a Chinese alien in Hong Kong to whom a son was later born, also in Hong Kong. The citizen parent had a contemporaneous birth certificate issued by the British government for his son, and a contemporaneous marriage certificate for his marriage issued by the British government. In addition, the child being born and living in Hong Kong with his mother, the American Consul was able to conduct a thorough investigation. Nevertheless a blood test was required.

These instances of imposition of blood tests in the cases of Hong Kong born Chinese take this case out of the rule of *Lue Chow Kon v. Brownell*, 2 Cir., 220 F.2d 187, and *United States ex rel. Dong Wing Ott v. Shaughnessy*, 2 Cir., 220 F. 2d 537, in each of which Judge Smith sustained a practice of subjecting to blood test all Chinese born in China, at pages 190 and 540 respectively, on the ground that that circumstance interposed great obstacles to investigation.

The worst that can be assumed is that these three Chinese children sought admittance to the United States upon a false claim of paternity. They made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the whites admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. As I stated in *United States v. Shaughnessy*, *supra*, 123 F.Supp. 674, at pages 677-678, such a practice violates the constitution. See, besides the cases there cited, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Mar Gong v. Brownell*, 9 Cir., 209 F.2d 448; *Lau Hu Yuen v. United States*, 9 Cir., 85 F.2d 327.

#### [*Distinctions from Other Applicants*]

It is true that these relators were born in China and that the *Kon* and *Ott* cases hold that Chinese born in China may be lawfully excluded under a practice which requires blood tests of Chinese born in China and of no others. Have these relators, who could thus have been lawfully excluded if that had been the practice, standing to raise the question of the constitutionality of their exclusion where the practice was to require blood tests of all Chinese? I recognize that one who attacks a practice as unconstitutional must show that it is unconstitutional as to him but that is exactly what relators have done here. They have shown that the practice excludes them where whites, in exactly the same circumstances, would have been admitted. The fact that they could have been lawfully excluded under a practice of requiring blood tests of all Chinese born in China and of no others is immaterial. That was not the practice under which they were excluded and which they are now attacking.

The imposition of blood tests in the cases of relators under the prevailing practice violated their constitutional rights to be free from discrimination. Except for the evidence in connection with blood tests the record would have entitled them to admission. Their writ of habeas corpus is sustained.

**ALIENS****Immigration—Federal Statutes**

**UNITED STATES ex rel. LEE KUM HOY, et al. v. Edward J. SHAUGHNESSY, District Director.**

United States Court of Appeals, Second Circuit, September 25, 1956, 237 F.2d 307.

**SUMMARY:** In the case summarized immediately above, involving blood tests administered to Chinese seeking admission to the United States as citizens, the District Director appealed the finding by the district court that the administering of blood tests was discriminatory and the Chinese cross-appealed the finding that blood tests could, under proper circumstances, be administered as a test of citizenship. The Court of Appeals for the Second Circuit, to which the appeal was brought, reversed, one judge dissenting, and ordered the writ of habeas corpus discharged as to the appeal but affirmed as to the cross-appeal. The court held that there was no evidence that the Bureau of Immigration and Naturalization was actuated by racial prejudice in administering blood tests to Chinese and that, under the peculiar circumstances, the tests were a valid means of establishing the truth of claims of citizenship.

Before CLARK, Chief Judge, and FRANK and HINCKS, Circuit Judges.

HINCKS, Circuit Judge.

This is an appeal from an order in a habeas corpus proceeding in which the relators are three Chinese-born minors claiming admission to the United States as citizens by derivation from one Lee Ha, concededly an American citizen, alleged to be their father. The respondent is the District Director of the New York District of the Immigration and Naturalization Service.

The putative father, who sued out the writ, came to the United States as a derivative citizen in 1926. He returned to China for a visit in 1929 and again visited China in 1938 for a period of 16 months. The relators, it is claimed, were begotten during these periods; Lee Kum Hoy being born in 1930, Lee Kum Cherk in 1939, and Lee Moon Wah in 1940. In 1949 the wife came to this country, and in 1952 the relators arrived. Lee Ha testified that prior to their arrival he had sent from this country substantial contributions to the support of his children in China but was unable to furnish any documentary evidence of the transmission of such funds.

**[Original Hearing]**

The original immigration hearing was held on August 14, 1952. The Board of Special Inquiry examined the relators and their parents with great particularity as to their village home in China, their dwelling house, various family celebrations, their neighbors and their relatives. The Board found that this testimony was "reasonably harmonious and reasonably consistent

with the records of the Immigration and Naturalization Service."

Shortly prior to this hearing, two blood grouping tests of the entire family had been made. The results of the tests were put into evidence at the hearing and objected to by the relators. Although conflicting in some particulars, the data common to both tests established conclusively that Lee Ha could not be the father of two of the relators. Since the children all swore that they were brothers and sisters, the Board of Special Inquiry found that Lee Ha could not be their father and ordered all three excluded from the United States. The Board of Immigration Appeals supported the decision treating the blood tests as convincing evidence of non-paternity.

**[Habeas Corpus Sought]**

A writ of habeas corpus then issued followed by three successive hearings before the District Court. In the first of these the relators claimed that use of the blood test evidence deprived them of due process of law because they were not allowed to cross-examine the blood-test technician and because the tests were discriminatorily administered to all Chinese, and no whites. Judge Dimock held that the right to cross-examine the technicians had been improperly denied and, without passing on the claim of discrimination, remanded for rehearing before the Board of Special Inquiry, D.C., 115 F.Supp. 302. An adverse decision by the Immigration

Service again brought the relators before Judge Dimock. This time he held that the blood test evidence had been properly received if the tests had been taken without undue discrimination but feeling that the evidence on the issue of discrimination was inconclusive he ordered another rehearing on that issue, D.C., 123 F.Supp. 674. After the Immigration authorities again ruled against the relators, Judge Dimock, in his third opinion, reported at D.C., 133 F.Supp. 850, found that the blood tests were administered to all Chinese and to no whites, and held that this was illegal discrimination. Accordingly, he sustained the writ and ordered the relators to be admitted as citizens of the United States.

From this order, the respondent appeals. The relators by their cross-appeal predicate error on Judge Dimock's ruling in his second decision that even without the sanction of statute or official, authorized, regulations the Immigration Service may make use of blood testing as a method of non-discriminatory investigative procedure.

#### [Evidence of Discrimination]

At the administrative hearings evidence relative to the claim of anti-Chinese discrimination was developed as follows. When American Consulates in China were closed, the Consulate in Hong Kong was flooded with passport applications by those theretofore living in the interior of China. The State Department then began taking blood tests in Hong Kong as a check on claims of paternity. The results of the tests having there proved useful as an investigative device, the procedure was adopted on an informal basis by individual investigators of the Immigration Service in its examination of Chinese arrivals beginning at some time, not precisely identified, in 1952. Between June 1952 and November 1953, at the request of the Immigration Service, 200 Chinese were blood tested by the Health Service, pursuant to a Federal Security Agency circular authorizing it to test United States citizens of Chinese descent. The Immigration Service also referred Chinese claimants to private physicians to make blood tests, one of whom testified that between early 1952 and November 1953 he tested 300 Chinese and no whites. To refute the respondent's contention that such tests were required of Chinese only in cases in which a birth certificate and opportunity to make a local investigation of

paternity were absent (as was generally true of those born and raised in the interior of China), the relators put in evidence proof of four cases of Hong Kong Chinese, who had birth certificates issued by the British government or the American Consulate in each of which blood tests had been requested. In three of these cases the request for blood tests was made between July 24, 1952 and June 2, 1954.

#### [Use of Blood Tests]

The first formal authority for the use of blood tests was contained in a precedent decision of the Board of Immigration Appeals handed down on February 25, 1953. The Immigration Service first promulgated instructions relating to blood tests in early 1953. The early instructions dealt only with visa petitions and certificates of citizenship: they did not directly or indirectly purport to apply to exclusion proceedings. While the early directives did mention the use of blood tests specifically in Chinese visa petition cases and applications for certificates of citizenship, those instructions at no time directed the use of blood tests exclusively in Chinese cases and at no time precluded the use of blood tests in non-Chinese cases.

More recently, some time in 1954, all of those instructions were rescinded and all current instructions concerning the investigation techniques with respect to cases wherein blood tests are deemed essential or necessary do not directly or indirectly refer to any racial or nationality group but predicate the requirement on the nature of the case and the issue of paternity or the relationship which is involved. No instruction of any kind as to Chinese or other persons has been issued with respect to exclusion hearings before Special Inquiry Officers.

The respondent, in an effort to show the blood testing of non-Chinese, pointed to four cases of testing in the 1952-1953 period but none of these were definitely identified as involving persons of non-Chinese extraction. The respondent offered as a witness an Attorney-Advisor in the office of District Counsel for the New York office of the Immigration and Naturalization Service who since 1941 had experience in the Service as a Naturalization Examiner and chief of the Status Section. Since 1946 he had been assigned to that office as Attorney-Advisor in which capacity he had had first-hand knowledge of all policy decisions and had participated in thousands of litiga-

gated cases, including cases involving evidence of citizenship involving Chinese persons. He testified that Chinese cases in the large fell within the general pattern described in *Mar Gong v. McGranery*, D.C.S.D.Cal., December 15, 1952, 109 F.Supp. 821,<sup>1</sup> and that a high incidence of fraud had been developed in the cases falling within that general pattern.<sup>2</sup> He testified further as follows. The Service had discovered that in bringing Chinese-born children to the United States there had developed a practice to prepare coaching books or "Halgoons" comprising an extensive written summary of family background reciting alleged details of family life, village, neighbors, schooling and local geography, which the alleged members of the family memorize and use as the basis for the answers to the questions asked of them severally, thus avoiding inconsistencies and concealing evidence of fraud which might otherwise develop on their respective examinations. The complicated structure of the Chinese calendar, the similarity of humble Chinese homes and villages as well as the Chinese language were unique factors which added to the difficulty of testing the credibility of witnesses in Chinese cases by separate examination as to the detail of significant family dates and abodes. This witness further testified:

"... As a matter of fact, it has been my experience that a substantial, if not the major proportion of all Chinese children arriving in the United States are admitted to the United States on primary inspection because no doubt exists as to their admissibility. But the large incidence of fraud in Chinese cases is known and is recognized, although the fraud in one of a thousand cases is never imputed to other cases, none-

1. That case was reversed and remanded on appeal. *Mar Gong v. Brownell*, 9 Cir., 209 F.2d 448. However, the appellate decision held only that fraud in other cases was not a proper factor to consider in making a judicial finding as to the alleged citizenship involved in a particular case such as the case there at bar. The opinion did not suggest that knowledge of frauds attempted in cases of a similar pattern might not be considered for its bearing on the scope of investigation appropriate in the particular case. Indeed, blood testing was involved in the *Mar Gong* case.
2. The administrative record, however, contained no evidence of the comparative incidence of fraud in Caucasian, or non-Chinese, cases involving the issue of paternity. It suggests at most, that only a small proportion of the non-Chinese cases fell within the range of the Chinese pattern described in 109 F.Supp. 821.

theless, it does form a very substantial and very rational basis for being particularly cautious in examining and in investigating cases which fall into the same pattern as the Chinese cases which have been demonstrated to be fraudulent, so that the Government's interests will be protected and the Government will not be imposed upon by fraudulent claims."

He testified further:

"For this reason, when the use of blood tests on such issues first came to the attention of the Immigration authorities, it was seized upon as one of the first genuinely, tangible methods of reaching the truth. It is the position of the Immigration Service that the use of blood tests under such circumstances is not discriminatory—but is necessary, by reason of the pattern and type of case!—and not because the persons involved happen to be of the Chinese race."

The respondent's witnesses categorically denied that racial discrimination in the use of blood tests had ever existed and attributed the number of Chinese tested in the 1952 period to a proper police motive on the part of individual investigators adequately to investigate cases which seemed suspicious against their current background, evaluated by the actual experience of those responsible for the enforcement of the applicable law. Their testimony showed that at a later period an increasing number of non-Chinese were blood tested.

#### [*Prior Cases Distinguished*]

We agree with the relators that this case is not governed by our former decisions in *Lue Chow Kon v. Brownell*, 2 Cir., 220 F.2d 187, and *U. S. ex rel. Dong Wing Ott v. Shaughnessy*, 2 Cir., 220 F.2d 537. The evidence of discrimination here is substantially more compelling than that before us in those cases. However, we do not recede from our holding in those cases that blood tests, if not taken because of discrimination on racial grounds, are competent evidence on the issue of paternity, at least in federal courts sitting in the State of New York. We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority

embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.

*[No Discrimination]*

We hold further that on the entire administrative record, only the salient portions of which are set forth above, the finding below that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing.<sup>3</sup> Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investi-

3. After the entry of the order below, the respondent moved to reopen to permit additional evidence to be taken by the court. The motion was supported by an affidavit made by an Investigator of the Naturalization Service detailed to investigate cases involving possible frauds perpetrated by persons of the Chinese race in connection with their admission to the United States. His affidavit recited, *inter alia*, that an examination of cases in the New York office of the Service made at the request of respondent's counsel disclosed a list, appended as Exhibit A, of 60 cases, each identified by file number, of white persons who had been blood tested between January 10, 1955 and August 4, 1955, and another list, appended to his affidavit as Exhibit B, comprising 124 Chinese-born persons admitted between March 31, 1952 and June 2, 1952, of which 40 had not been blood tested.

This motion for a reopening was denied without opinion or comment. We think it plain that the facts thus sought to include in the record, if established after proper cross-examination, would have had some substantial weight to refute the evidence indicative of racial discrimination. It is true that the blood testing of whites in 1955 does not fully demonstrate the absence of anti-Chinese discrimination in 1952. But even so it is a factor which would make it more reasonable to attribute the absence of blood testing for whites in 1952 to the administrative difficulty of immediately expanding a newly utilized investigating technique which happened to begin with Chinese-born entrants to cover entrants of all other national extractions. Perhaps the motion was denied because deemed untimely; perhaps because the judge below thought that the evidence proffered, even if received, would not alter his finding of discrimination. In view of our contemplated disposition of this appeal, we do not need to pass upon the propriety of that ruling.

gators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases. As the Special Inquiry Officer pointed out in his opinion, the technique of blood tests to check claims of paternity was a new procedure which originated in the American Consulate in Hong Kong whence it spread to the Immigration Service. We agree with him that discrimination did not result because in less than two years it was not immediately adopted in every case. We affirm substantially on the grounds stated in the last "decisions" of the Special Inquiry Office and the Board of Immigration Appeals, being satisfied that on the whole the administrative record supported the conclusion reached therein, viz., that discrimination had not been proved. Cf. *Tulsidas v. Insular Collector*, 262 U.S. 258, 43 S. Ct. 586, 67 L.Ed. 969; *O'Connell ex rel. Kwong Han Foo v. Ward*, 1 Cir., 126 F.2d 615.

*[Present Policies Valid]*

Certainly, there was no evidence that in any other particular cases the particular investigating officer or Special Inquiry Officer involved was actuated by racial prejudice either in requesting blood tests or in processing the case without blood tests: so far as the direct evidence shows the scope of investigation in every case processed was adjusted to accord with doubts as to the bona fides of the applicant's claimed paternity and to the availability of local sources of information at the applicant's foreign residence. And even if, contrary to our view, occasional prejudice on the part of individual officers of the Service were deemed proved by inference arising from the preponderance of Chinese cases among those blood tested, it does not follow that the officers responsible for the policies of the Service had consciously, in 1952, adopted a discriminatory policy. Surely the policy-makers were not under duty to re-examine cases disposed of with or without administrative appeal, apparently on a factual basis, in a search for an undisclosed discriminatory motive on the part of the particular officers, or to keep elaborate and expensive statistics classifying each case for its race and nationality, and developing the particular reasons which had determined the scope of the investigation made by the individual investigators. The evidence showing that no such statistics were currently accumulated,

warrants no inference to bolster the relators' case on the issue of discrimination. Rather, we think, it tends to betoken that in 1952 the Service was not even race-conscious in the formulation of its investigative policies. It also furnishes a reasonable explanation for the respondent's difficulty and occasional inconsistencies (too much stressed below) in attempting for purposes of the reopened hearing of October 28, 1954 to determine and synthesize into a general pattern the evanescent reasons on which individual officers had shaped the scope of numerous investigations made two years before.

In our judgment, the four cases of Hong Kong Chinese, earlier adverted to, of applicants who were blood tested although possessed of birth certificates issued by the American Consulate, are not enough to impugn the administrative conclusion. At most, those cases are of slight weight in showing the then existence of racial discrimination and certainly are not conclusive of discrimination against these relators.

The respondent's appeal is reversed with a direction to dismiss the writ. Affirmed on the cross appeal.

#### [Dissent]

FRANK, Circuit Judge (dissenting as to respondent's appeal).

I concur in the affirmance on relators' cross appeal. As to respondent's appeal, I dissent, for the reasons stated by Judge Dimock in his opinions reported in D.C., 123 F.Supp. 674<sup>1</sup> and

1. In 123 F.Supp. 674, 677-678, Judge Dimock said: "Relators allege deliberate use of the blood test technique to exclude Chinese and admit others similarly qualified except for race. This result is reached, they say, because the application of the blood tests to Chinese and not to others constitutes more stringent enforcement of the immigration laws against Chinese than against others. Chinese persons, they say, are always subjected to the rigorous inquisition of a blood test while others, no matter how inconclusive may be the other evidence, are never subjected to a blood test. If such a deliberate use of the blood test technique to exclude Chinese exists, the discrimination against Chinese is clear even though the result may be to allow the admission of unqualified non-Chinese rather than to prevent the admission of qualified Chinese. It makes no difference that the complaint of the Chinese is against failure to go to the full extent of the law in the case of non-Chinese rather than against going beyond the law in the case of Chinese. A minority could be as effectively persecuted by enforcing a law against them alone as by acting against them without warrant of law. Racial discrimination is abhorrent to our institutions. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Hirabayashi v.*

D.C., 133 F.Supp. 850.<sup>2</sup> I shall not repeat in detail his statement of the evidence or his reasoning. I think the record amply justifies his conclusion, 133 F.Supp. at page 852, that, "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person had been subjected to a blood test or a Chinese excused from one." Judge Dimock seems to me to show, unanswerably, that we have here an unconstitutional administration of a valid statute.<sup>3</sup>

He carefully pointed out how the government, in the several stages of the hearings before him, kept shifting its position in a way which warranted his distrust of its protestations of an absence of discrimination.<sup>4</sup> On the third administrative hearing (held pursuant to Judge Dim-

<sup>1</sup> U. S., 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774; *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 [98 L.Ed. 884].

<sup>2</sup> In 133 F.Supp. 850, 854, Judge Dimock said:

"The worst that can be assumed is that these three Chinese children sought admittance to the United States upon a false claim of paternity. They made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the whites admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. As I stated in U. S. [ex rel. Lee Kum Hoy] v. Shaughnessy, supra, 123 F.Supp. 674, at pages 677-678, such a practice violates the constitution. See, besides the cases there cited, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Mar Gong v. Brownell*, 9 Cir., 209 F.2d 448; *Lau Hu Yuen, v. U. S.*, 9 Cir., 85 F.2d 327."

<sup>3</sup> See, e. g., *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

<sup>4</sup> In 133 F.Supp. at pages 852-853, Judge Dimock said:

"In July of 1953, when charges of racial discrimination against the Chinese in blood tests were first made in relators' application for a writ of habeas corpus, the government denied that Chinese were singled out for such tests and claimed that blood tests were required in all cases where there were no birth certificates or other documents of identity. Thus, in the Government brief, it was stated that blood tests were not imposed upon Chinese persons alone, but upon 'all persons attempting to enter the United States without birth certificates and similar documents'. Similar statements were contained in several subsequent government affidavits to the effect that blood tests were required only in those cases where there was an absence of birth

ock's opinion reported in 123 Fed.Supp. 674) respondent introduced the testimony of an Attorney-Advisor in the New York office of the Service. This testimony was designed to rebut the strong case of discrimination theretofore made by relators. This witness narrated instances purporting to prove absence of discrimination, and added his impressions of the administrative practices. Relators were denied the

certificates and other documentary evidence of identity.

"In answering this argument of the government, relators cited two cases where Chinese persons were blood tested notwithstanding the fact that they had birth certificates. This was noted by me in my decision at 123 F.Supp. 674, 677, supra, where I said that these two cases lent substance to the claim that Chinese, regardless of the availability of birth certificates or other documents, were always subjected to a blood test while other persons never were.

"In the reopened hearing following that decision, the Immigration Bureau witness sought to minimize the importance of birth certificates in determining whether a blood test was necessary, stating that it was 'only one of the many criteria' for determining whether a blood test was needed in a particular case. According to the witness there are three common patterns of children of American citizens born abroad who apply for admittance to the United States as citizens. The first involves an American child in an 'American colony' abroad, whose parents keep in close touch with the Consulate, and where the births and marriages would be registered at the Consulate. The second pattern, which, like the first, is not the usual pattern for Chinese children, would be where the American parent is not known to the Consulate, but where birth and marriage certificates are produced to substantiate the claim and, most important, the children involved are born in an area where the Consul could speedily conduct an investigation and ascertain from neighbors, friends and local government officials, the true identity of the child.

"In the foregoing two patterns of cases, the witness stated 'there would be no need for using blood test evidence to verify an obvious relationship.' The third type of situation was one which he said was typical of Chinese. This was where the child was born in the remote interior of China, where no birth or marriage certificates were kept, and, most important of all, the claimed area of birth was inaccessible to the Consul and hence where he could not conduct any investigation as to the circumstances of the child's birth. The witness then concluded and reaffirmed on cross examination that the most important factor in determining whether a blood test would be required is whether a child is born in an area where the American Consul can readily conduct an investigation. He said that, if the Consul could verify the identity of the child involved from his investigation, by talking to neighbors, friends and local officials, there would be no need for a blood test.

"Although the witness testified that the most important criterion for determining the necessity of a blood test—namely, the ability of the consulate to investigate the area of a person's birth—had been a factor in immigration investigations which ante-

opportunity to see the administrative records to which this witness had referred. The witness conceded, on cross-examination, that his testimony was inconsistent with statements previously made by him in the return to the writ of habeas corpus. I think his testimony, which my

dated by a long time the use of blood tests, he admitted that, in the government brief filed when this case was first argued, there was no mention at all of this 'most important' criterion. Similarly, in the subsequent government affidavits filed prior to the issuance of my decision, the Immigration Service had stated specifically that blood tests were required in cases where there were no birth certificates or documentary evidence, and there was no mention whatsoever of the feasibility of a consular investigation as being determinative of whether blood tests were necessary.

"To show that Chinese persons claiming a right to enter the country as children of United States citizens are always required to submit to blood tests, irrespective of how satisfactory their other proof as to identity was and regardless of whether they were born in an area where a consular investigation was possible, relators cited several cases as examples.

"Exhibit No. 27, involved L-L the son of L-H, an American citizen of Chinese descent. L-L was born in Hong Kong, and produced a contemporaneous official birth certificate issued by the British government to prove his identity. This certificate stated the names of his parents and the place and date of his birth. In addition, the parents of L-L, having been married in Hong Kong, produced a marriage certificate. Most important, the son and mother were living in Hong Kong, and an investigation by the American Consul there was thoroughly feasible, and in fact conducted. Nevertheless, L-L, a child only a year and a half old at the time, was subjected to a blood test along with his father and mother.

"Exhibit No. 28, involves Ng Ho Gim, an American citizen of Chinese descent, who petitioned for his six year old son who was living in Hong Kong with his mother. His son was born in Hong Kong and his birth was registered at the American Consulate which issued a certificate verifying the birth of the child and the marriage of the parents. Notwithstanding the American Consulate's own certificate acknowledging the identity of the child and the fact of his parents' marriage, and in spite of the fact that the child was living in Hong Kong, thus making a thorough investigation possible, a blood test was still demanded of the parents and the child.

"Exhibit No. 29 involves a naturalized American citizen of Chinese descent who married a Chinese alien woman in Hong Kong who subsequently gave birth to a child there. In a petition to bring his son over, the citizen submitted a contemporaneous birth certificate issued by the British government for his son, and his marriage certificate, also issued by the British government. In addition, the son and wife were living in Hong Kong where an investigation was feasible. But most important there were prior records of the wife and son at the American Consulate and the Consul had been for a long time cognizant of the family relationship of the individuals. Nevertheless, a blood test was required of all the parties.

"Exhibit No. 30 involves an American citizen of

colleagues stress, was wholly insufficient to offset relators' proof of discrimination.<sup>5</sup>

The administrative decision, made in 1952, adverse to relators, rested solely on the blood test evidence. Judge Dimock found (I think correctly) that such blood tests were discriminatorily applied as against Chinese persons; that therefore that evidence was improperly received; and that, except for that evidence, the record entitled relators to admission. Accordingly, they should have been admitted in 1952. It is suggested that this conclusion is artificial and academic, for this reason: Since the time of the adverse administrative decision in 1952, blood tests have been applied without discrimination, so that, if there were now a new administrative hearing, new blood tests could be received properly and would prove that relators are not citizens. I cannot agree with this argument: On the record, as it stood when the adverse administrative decision was made in 1952, defendants should have been admitted at that time, and therefore we should deal with the case as if they had been.

#### [Yick Wo Case]

At first glance, it might seem absurd that the blood test evidence should be disregarded, inasmuch as it demonstrates that relators are not citizens.<sup>6</sup> But such was the sort of result reached in the justly famous case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. There the relator had been convicted of a violation of an ordinance, and the Supreme Court accepted that violation as a fact. Nevertheless, the Court held that relator must be released on a habeas corpus writ because the ordinance had been discriminatorily applied to Chinese alone. The Court said in 118 U.S. at pages 373-374, 6 S.Ct. at page 1073: "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered with an evil eye and

Chinese descent who married a Chinese alien in Hong Kong to whom a son was later born, also in Hong Kong. The citizen parent had a contemporaneous birth certificate issued by the British government for his son, and a contemporaneous marriage certificate for his marriage issued by the British government. In addition, the child being born and living in Hong Kong with his mother, the American Consul was able to conduct a thorough investigation. Nevertheless a blood test was required."

5. See footnote 4.

6. Cf. a case where a decision rests on evidence which indubitably proves a defendant's guilt, but has been obtained by an unlawful search and seizure.

an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." See also, e.g., *Norris v. Alabama*, 294 U.S. 587, 589, 55 S.Ct. 579, 79 L.Ed. 1074; *Smith v. Texas*, 311 U.S. 128, 130-131, 61 S.Ct. 164, 85 L.Ed. 84; *Patton v. Mississippi*, 322 U.S. 463, 465-466, 68 S.Ct. 184, 92 L.Ed. 76.

#### [Bolling v. Sharpe]

It might be argued that the doctrine of *Yick Wo v. Hopkins* turns on the requirement of "equal protection of the laws" found in the 14th Amendment and that there is no like provision applicable to the federal government. But in *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 694, 98 L.Ed. 884, the Court said, "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."<sup>7</sup>

7. I think it would be improper to direct Judge Dimock now to take evidence as to relators' citizenship in a *de novo* judicial hearing. If relators had been residents of this country, and on their re-entry had asserted their American citizenship, I think they would have been entitled, on their demand, to such a judicial hearing *de novo*. See *Chin Yow v. U.S.*, 208 U.S. 8, 28 S.Ct. 201, 52 L.Ed. 369; Cf. *U. S. ex rel. Medeiros v. Watkins*, 2 Cir., 166 F.2d 897, 900 (dissenting opinion); *Shaughnessy v. U. S. ex rel. Mezei*, 345 U.S. 206, 214-215, 73 S.Ct. 625, 97 L.Ed. 956. On the facts of this case, however, the sole function of Judge Dimock was to determine whether the administrative finding of lack of citizenship was supported by the evidence received at the administrative hearing in 1952 and to decide whether the administrative decision adverse to relators was legally justified. *Shaughnessy v. U. S. ex rel. Mezei*, 345 U.S. 206, 213-215, 73 S.Ct. 625. Judge Dimock decided that the evidence properly received at the administrative hearing did not support the administrative finding and the ad-

ministrative decision, and that, as of 1952, relators were entitled to come into this country as citizens.

After Judge Dimock had filed his opinion sustaining the writ, the government moved for a reargument and for a hearing *de novo*, on new evidence, before Judge Dimock. This motion was supported by an affidavit of Inspector Yarbrough. In part the affidavit related to an irrelevant showing of lack of discrimination beginning in 1955. Attached to the affidavit was an Exhibit showing that 40 Chinese persons, out of a total of 124, had been admitted without blood tests between March 1 and September 30, 1952. Relators in a reply affidavit stated: "It will be noted that most of these persons were admitted during the first part of the period involved before blood tests for all Chinese applicants was officially commenced. Moreover, the date of admission no doubt is the date of the final determination of admission and is not the earlier date of the arrival of the applicants at which time they would be examined by the Immigration Service. Dr. George F. Cameron of the United States Public Health Service testified in this case that he did not start blood testing until June 1952. It is obvious that a number of Chinese may have

escaped blood testing in March, April and May, or even in June, before the mechanics for blood testing were devised and before the practice became uniformly established as it was at the time that the relators in this case were blood tested in July and August 1952. Dr. Cameron testified that when he began blood testing in June 1952 he was directed to blood test only Chinese and that he did not blood test any white persons. It is submitted therefore that Exhibit B annexed to Investigator Yarbrough's affidavit is of no assistance and supplies no basis whatsoever for a rehearing. Moreover, the statement that one Chinese recently was not blood tested obviously has no bearing on the uniform practice of blood testing all Chinese which was proved to exist commencing in June 1952."

I think Judge Dimock correctly denied this motion. In addition to the insufficiency of the proposed additional evidence, it would have been improper for the judge to hold a *de novo* hearing. Moreover, the motion was an application for a new trial upon newly discovered evidence, and all the suggested new evidence had previously always been in the government's possession.

## REAL PROPERTY

### Restrictive Covenants—Colorado

**Ulysses S. SMITH and Helen R. Smith v. Paul CLARK et al.**

District Court, City and County of Denver, Colorado, July 2, 1956, Civil Action No. B 2247.

**SUMMARY:** The plaintiffs, claiming to be the owners of certain real property in Denver, Colorado, brought an action in a Colorado state court to quiet title to their property. The plaintiffs brought the action as Negroes, on the ground that the existence of a racially restrictive covenant in the deed to their property placed a cloud on their title to the property. The restrictive covenant was an agreement made as part of the deed to land, of which the plaintiff's was a part, that no owner or subsequent owner would sell the property to "any colored person." The enforcement of this covenant was to be by suit by other property owners for damages or specific performance. The court in which the action was brought entered a decree adjudging the restrictive covenant to be void and not enforceable. This decision was based on decisions of the United States Supreme Court holding that such racial restrictive covenants may not be enforced in state courts, such enforcement being "state action" which would be in violation of the Equal Protection Clause of the Fourteenth Amendment, although the Supreme Court of Colorado had decided to the contrary in earlier decisions.

FRANTZ, J.

THIS MATTER coming on to be heard on the 1st day of June, 1956, upon a trial of the merits concerning all questions of fact and law and the Court finding:

That each defendant herein has been properly served as required by law and rule of the Court, or has voluntarily entered an appearance herein;

That Ben Klein, attorney at law, has been

heretofore appointed and appeared for any and all defendants who are in, or who may be in, or who may have been ordered to report for induction into, the military service as defined by the Soldiers and Sailors Civil Relief Act of 1940, as amended;

That this is an action in rem affecting specific real property, to-wit:

The North Five and One-Half (5½) feet of Lot 24, all of Lot 25, and the South

Seven (7) feet of Lot 26, Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado;

That the court has jurisdiction over all parties to this suit and of the subject matter thereof;

That Barry, Hupp & Dawkins, attorneys at law, have appeared for the plaintiffs above named;

That Knight, Lesher & Schmidt, attorneys at law, have appeared for the defendant, Midland Federal Savings & Loan Association;

That John C. Banks, Charles H. Haines and Thomas G. Roche, attorneys at law, have appeared on behalf of the City and County of Denver, a municipal corporation, defendant; and Meadow and Meadow, attorneys at law, and Hunt and St. Germaine, attorneys at law, have appeared on behalf of the contesting defendants in this action, Capitol Federal Savings & Loan Association, Whitney J. Armelin and Carmelita Armelin;

That the Court further finds that the plaintiffs are colored persons of Negro extraction, and claim to be the owners in fee simple, in joint tenancy, with right to possession, of the above described real property through mesne conveyances, and by virtue of that certain warranty deed recorded in Book 7522 at Page 180 of the Records of the City and County of Denver, State of Colorado, wherein said property was conveyed to these plaintiffs by the defendants, Paul Clark and Jane Clark, also known as Jean Clark, by said warranty deed.

#### [Covenant]

The above described real property is a part of Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado; the said Block 6 is affected by an Agreement providing for a racial restriction, and is recorded in Book 5635, at Pages 276 and 277 of the Records of the Clerk and Recorder of the City and County of Denver, State of Colorado. The pertinent part of this Agreement reads as follows:

"The undersigned for themselves and their heirs and assigns covenant and agree not to sell or lease the said above described lots and parcels of land owned by them respectively, or any part thereof, to any colored person or persons, and covenant and agree not to permit any colored person or

persons to occupy said premises during the period from this date to January 1, 1990. It is further covenanted and agreed that any and all right, title or interest in any of said lots or parcels of land that shall be conveyed or leased in violation of this agreement shall be forfeited to and rest in such of the then owners of all of said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim with the recorder of the City and County of Denver prior to any conveyance, lease or mortgage of said property to a bona-fide white person. Such assertion of title shall be made by filing for record with the Recorder of the City and County of Denver notice of the violation of this Agreement, describing the property and giving the names of persons involved. \*\*\*

It is further covenanted and agreed that in case of a violation of this Agreement by any of the undersigned or by their heirs, executors, administrators or assigns, the then owners of the aforementioned lots and parcels of land who shall not have violated this Agreement shall jointly and severally have and be entitled to maintain an action against any person or persons violating this Agreement to recover any and all damages on account of the violation of this Agreement, or such owners may jointly or severally enforce or have their rights hereunder enforced by an action for specific performance, abatement, ejectment, or by injunction or any other proper judicial proceedings, which right shall be in addition to any and all rights to the interest so conveyed or leased in violation of this Agreement."

The defendants, Capitol Federal Savings & Loan Association, Whitney J. Armelin and Carmelita Armelin filed for record a Notice of Claim in Book 7769, at Page 474 of the Records of the Clerk and Recorder of the City and County of Denver, State of Colorado, asserting title pursuant to the provisions of said Agreement.

Capitol Federal Savings & Loan Association and the Armelins contend that the federal decisions on restrictive racial covenants are not controlling because we here are dealing with (1) a fee simple determinable (Charlotte Park

and Recreation Commission v. Barringer, 242 N.C. 311, 88 S.E. (2) 114), (2) a fee subject to a condition subsequent (Corvell v. Colorado Springs Co., 3 Colo. 82; Union Colony Co. of Colorado v. Gallie, 104 Colo. 48), (3) an executory limitation (Allen v. White, 36 Colo. 39, Burden v. The Colorado National Bank, 116 Colo. 111), and (4) a title vesting automatically upon the happening of a condition or event.

*[Colorado Supreme Court Holding]*

The Supreme Court of Colorado has heretofore refused to invalidate racial restrictions, holding that such covenants are "not only not violative of the Fourteenth Amendment but [are] not contrary to public policy." Chandler v. Zeigler, 88 Colo. 1 (1930); Steward v. Cronan, 105 Colo. 393 (1940).

Since the rendition of those decisions the Supreme Court of the United States has held such covenants repugnant to the Fourteenth Amendment where adherence to the covenant is required by state action. "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in those cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimina-

tion shall be made against them by law because of their color." Shelley v. Kraemer, 334 U.S. 1, 92 L. ed. 845, 68 S. Ct. 836, 3 A.L.R. (2) 441, 463, 464.

*[Covenants Not Enforceable by Court]*

The courts of the land may not enforce these racial agreements, for, to do so, would be state intervention, the very thing which the Supreme Court of the United States holds violative of the Fourteenth Amendment. Shelley v. Kraemer, *supra*; Barrows v. Jackson, 346 U.S. 249, 97 L. ed. 1586. These cases declare that these covenants in themselves are not invalid; that no one would be punished for making them; and that no one's constitutional rights are violated "by the covenantor's voluntary adherence thereto."

"Such voluntary adherence would constitute individual action only." Barrows v. Jackson, 97 L. ed. 1586, 1954. But, when resort must be had to the court to enforce the racial restriction, either directly, Shelley v. Kraemer, 433 U.S. 1, 92 L. ed. 845, 68 S. Ct. 836, 3 A.L.R. (2) 441, or indirectly, Phillips v. Naff, 332 Mich. 389, 52 N.W. (2) 158; Clifton v. Puente, 218 S.W. (2) 272 (Tex.); Barrows v. Jackson, 346 U.S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, the Court must yield to the constitutional command of the Fourteenth Amendment, and refuse enforcement.

Every refusal to abide by the terms of the restriction, requiring suit to make effective such restriction, removes the case from the rule of voluntary adherence. Such is the present suit; the parties are in court, and the court must withhold its hand to enforce in any wise the covenant.

The court further finds that the defendant, the City and County of Denver, a municipal corporation, has asserted title to the rear eight feet of the lots described above, the subject of the within action, in trust for the public as a part of a public alley sixteen feet wide extending North and South through Block 6, Ashley's Addition to the City of Denver, situate in the City and County of Denver and State of Colorado. This defendant also claims and maintains that it has constructed and now maintains a sanitary sewer through the rear eight feet of the property described above, which sewer extends along said alley in said Block 6 for the entire length of said block. That this

court finds that the said defendant, City and County of Denver, a municipal corporation, does in fact hold title to the said rear eight feet of the lots described above in trust as above set forth, and has maintained and constructed the said sanitary sewer and that it has a lawful right to maintain and operate said sewer through said property.

[*Plaintiffs' Title*]

That this Court further finds, in the light of the above decisions, that the plaintiffs, at the time of the commencement of this proceeding, were, and they now are, the owners in fee simple, in joint tenancy, with right to possession, of the real property, the subject of this action described above.

That this court finds that the real property, the subject of this action, is subject to that certain interest of the defendant, Midland Federal Savings & Loan Association, arising out of, and by virtue of, that certain deed of trust recorded in Book 7522 at Page 181 of the Records of the Clerk and Recorder of the City and County of Denver, State of Colorado, and by virtue of that certain assignment of rents in favor of this defendant, recorded in Book 7522 at Page 184 of said records.

That the defendants, Paul Clark and Jane Clark, also known as Jean Clark, this court finds, are entitled to, and have an interest in the real property, the subject of the within action, by virtue of that certain deed of trust recorded in Book 7522 at Page 170 of the said Records of the City and County of Denver, State of Colorado.

That the court further finds that the allegations of the plaintiffs' amended complaint are true; that every claim made by said defendants is unlawful and without right; that no defendant herein has any title or interest in or to the property described herein or any part thereof, with the exception of the title and interest as above set forth which the defendant, City and County of Denver, a municipal corporation, now holds and with the exception of the interests that the defendant, Midland Federal Savings & Loan Association, and the defendants, Paul Clark and Jane Clark, also known as Jean Clark, now hold by virtue of the above mentioned deeds of trust and the above mentioned assignment of rents; THEREFORE,

IT IS ORDERED, ADJUDGED AND DECreed, pursuant to Rule 105 of the Colorado Rules of Civil Procedure, that the plaintiffs, at the time of the commencement of this proceeding, were and they now are, the owners in fee simple, in joint tenancy, with right to possession, of the real property situated in the City and County of Denver, State of Colorado, described as follows:

The North Five and One-Half (5½) feet of Lot 24, all of Lot 25, and the South Seven (7) feet of Lot 26, Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado.

That complete fee simple title in and to said real property be and the same hereby is quieted in and to the above persons, free and clear of any enforcement or attempted enforcement of that certain Agreement or restrictive covenant, including that certain Notice of Claim, the said Agreement recorded in Book 5635 at Page 276, and the said Notice of Claim recorded in Book 7769 at Page 474, of the records of the Clerk and Recorder of the City and County of Denver, State of Colorado, and that the defendants, and each of them, including "ALL UNKNOWN PERSONS WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION," have no right, title or interest in or to the said real property described above or any part thereof, and all persons claiming, or to claim, by, through or under them, or any of them, be, and they are forever enjoined from asserting any claim, right, title or interest, in or to the said real property, or any part thereof, with the exception of the following: that certain deed of trust recorded in Book 7522 at Page 181 by which the said real property was conveyed to the Public Trustee of the City and County of Denver in trust, for the use and benefit of the defendant, Midland Federal Savings & Loan Association; and with the exception of that certain assignment of rents recorded in Book 7522 at Page 184 of the records of the Clerk and Recorder of the City and County of Denver, State of Colorado, executed in favor of the said defendant, Midland Federal Savings & Loan Association; and with the exception of that certain deed of trust recorded in Book 7522 at Page 170 of the records of the Clerk and Recorder of the City and County of Denver, State of Colorado, by which the said real property subject to this action was conveyed to the

Public Trustee of the City and County of Denver, State of Colorado, in trust, for the use and benefit of the defendants, Paul Clark and Jane Clark, also known as Jean Clark; and that said instruments are in full force and effect and are completely valid and enforceable in all their terms; and with the exception also, of the title of the defendant, the City and County of Denver, a municipal corporation, has in and to the said real property, said City and County of Denver, a municipal corporation, at the time of the commencement of this proceeding, was and it now is, the owner to the rear eight feet of the lots described above in trust, for the public, as a part of a public alley sixteen feet wide extending north and south through Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado, said City and County of Denver at the time of the commencement of this proceeding, and before, has maintained and constructed a sanitary sewer, and that it has a lawful right to continue to maintain and operate said sewer through the rear eight feet of the property described above, which sewer extends along the said alley in said Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado, for the entire length of said Block 6.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED,** pursuant to Rule 57 of the Colorado Rules of Civil Procedure that the certain Agreement contained in Book 5635 at Page 276 of the records of the Clerk and Re-

corder of the City and County of Denver, State of Colorado, is a restrictive covenant or agreement, containing racial restrictions concerning the ownership, transfer or leasing of the lots and parcels of real property situated in Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado, and that said restrictions and forfeiture provisions contained therein, including that certain Notice of Claim, containing an assertion of title to the real property the subject of the within action, by the defendants Whitney J. Armelin, Carmelita Armelin and Capitol Federal Savings & Loan Association, and recorded pursuant to said Agreement in Book 7769, at Page 474 of said records, are completely nonenforceable and without effect, and the same may not be enforced by this Court as a matter of law, as to enforce same by this court would be a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and the enforceability of same is hereby removed as a cloud upon the title of the plaintiffs in and to the real property described as follows:

The North Five and One-Half (5½) feet of Lot 24, all of Lot 25, and the South Seven (7) feet of Lot 26, Block 6, Ashley's Addition to the City of Denver, City and County of Denver, State of Colorado.

That this declaratory judgment is based upon the findings of this court concerning the law and facts as above set forth in the body of this decree.

## CONTEMPT

### NAACP—Alabama

(See *Ex Parte NAACP*, *supra* at p. 177).

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## DEFAMATION

### Newspaper Advertisements—Georgia

**ANDERSON v. ATLANTA NEWSPAPERS, Inc., et al.**

Supreme Court of Georgia, December 5, 1956, No. 19439.

**SUMMARY:** Stating that the Atlanta Newspapers, Inc. and a real estate firm in Atlanta, Georgia, had conspired to force her to sell her property in that city to persons of the Negro

race and thus "destroy racial segregation in Atlanta, Fulton County and Georgia" a home owner brought suit in a Georgia state court seeking an injunction and the recovery of damages to herself and her property. The suit was based on the publication of an advertisement by the newspaper in which the realty company offered for sale to colored persons a number of properties, including the plaintiff's. The newspaper company filed demurrers to the plaintiff's petition, stating that the petition did not state a valid cause of action against it. After hearing the trial court dismissed the case as to the newspaper company. On appeal the Supreme Court of Georgia affirmed, stating that the petition failed to state a cause of action for any of the relief sought.

WYATT, Presiding Justice.

Plaintiff in error brought suit against Atlanta Newspapers, Inc. and Jessie Colzie, doing business as Colzie Realty Company. It was alleged, among other things, that on October 30, 1955, Atlanta Newspapers, Inc. published an advertisement in the combined edition of its papers on behalf of Colzie Realty Company in which there was offered for sale to colored persons a number of properties, among them a house and lot known as 751 Bolton Road, N. W., Atlanta, Georgia; that the plaintiff in error owned said property in fee simple and had not authorized anyone to sell her property, but that the defendants had entered into a conspiracy to force petitioner to sell her home to persons of the Negro race and to destroy racial segregation in Atlanta, Fulton County and Georgia. She alleged that because of said advertisement, her property was reduced in value to the extent of \$6000.00, and she suffered humiliation, mortification and ridicule. The petitioner prayed for compensatory and punitive damages and for temporary and permanent injunction restraining both defendants from again advertising her home for sale to colored people or "anybody else". The defendants filed general and special demurrers to the petition as twice amended. After a hearing, the general demurrers of the defendant Atlanta Newspapers, Inc. were sustained and the petition was dismissed as to them. The demurrers of the defendant Colzie Realty Company were not passed upon. The exception here is to the sustaining of the general demurser of the Atlanta Newspapers, Inc. Held:

1. The petition in the instant case is a long and rambling document which contains numerous allegations having no apparent relationship to the cause of action sought to be recovered upon. It would serve no useful purpose to here set out the allegations of this petition. It is sufficient to say that it fails entirely to allege

sufficiently any injury to the petitioner which resulted from the actions of the defendant Atlanta Newspapers, Inc. The allegations as to injury and damages are purely and simply conclusions of the pleader without any semblance of facts to support them. She only alleges that she was humiliated, mortified and ridiculed by her neighbors and that her property was damaged in the amount of \$6000.00. No facts are alleged to show how these injuries were caused by the defendant Atlanta Newspapers, Inc. It is well settled that when one is suing for damage to property, there can be no recovery on account of mental anguish not accompanied by damage to property. See *Hendricks v. Jones*, 28 Ga. App. 336. Likewise, it must be shown, before recovery may be had for humiliation, that the facts and circumstances were such as would likely humiliate and insult any person in like circumstances. *Georgia Railroad and Electric Company v. Baker*, 1 Ga. App. 832. None of these requirements are met by the petition before us.

2. The petition does not set out any grounds for injunctive relief because it does not show any present injury or such action by the defendant newspaper company as would result in injury. See *Wallace v. City of Atlanta*, 200 Ga. 749. The petition simply alleges that unless enjoined, "said ad may be repeated not only on Nov. 7, 1955, but on future dates." It is nowhere alleged that the newspaper company has even threatened or planned to again publish said advertisement, or any fact from which the plaintiff could reasonably apprehend that the defendant newspaper might do any act which would result in injury to the plaintiff or her property. Therefore, the petition failed completely to set out a cause of action for any of the relief sought. It follows, it was not error to sustain the general demurser of the defendant newspaper company and dismiss the petition as to them.

Judgment affirmed. All the Justices concur.



# LEGISLATURES

## EDUCATION

### Public Schools—District of Columbia

*The Subcommittee to Investigate Public School Standards and Conditions, and Juvenile Delinquency in the District of Columbia* of the Committee on the District of Columbia, of the House of Representatives, Eighty-Fourth Congress, Second Session, was composed of Representatives James C. Davis of Georgia, Chairman, John Bell Williams of Mississippi, Woodrow W. Jones of North Carolina, A. L. Miller of Nebraska, Joel T. Broyhill of Virginia, and DeWitt S. Hyde of Maryland, with William Gerber of Tennessee as Chief Counsel. The Subcommittee held hearings in September and October, 1956, with regard to the conditions existing in the public schools of the District of Columbia and with particular reference to problems of racial integration. The Subcommittee has made a report to the full Committee recommending in part, by a divided vote, the reestablishment of racially separate schools in the district. The findings, conclusions and recommendations of the Subcommittee, together with minority views, are set out below. [A report of the Superintendent of Schools to the Board of Education of the District of Columbia, dated January 4, 1957, commenting on the Subcommittee's report follows immediately after the printed excerpt.]

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#### FINDINGS AND CONCLUSIONS

Having heretofore set out in considerable detail the various phases of the District of Columbia school operation and the problem of juvenile delinquency as pertaining to said schools, the subcommittee after a careful review of the established facts, concludes and finds that:

1. The Board of Education without sufficient consideration of the enormous problem, with scant preparation, and without adequate study or survey of known integrated school systems, too hastily ordered the integration of the District of Columbia schools.

2. The forced integration of the schools in the District of Columbia greatly accelerated an exodus of the white residents to the suburban areas of Virginia and Maryland. The present exodus seriously threatens the educational, economic, cultural, religious, and social foundation of the District. If the exodus continues at its present rate, the District will become a predominantly Negro community in the not too distant future.

3. The integration of the schools in the District of Columbia has focused attention upon the differences in ability to learn and educational achievement between the average white and Negro students, as reflected by the national standardized tests.

4. The wide disparity in mental ability to learn and educational achievement between the white and Negro students has created a most difficult teaching situation in the integrated schools. So much of the time of the teachers is being taken up in teaching the retarded students that the capable students are not receiving the proper time and attention and are therefore failing to develop in accordance with their educational ability.

5. The majority of white principals and teachers faced the challenge presented by integration with high morale, cooperation, and determination. At the outset, many felt that integration was correct. After 2 years of trial, many of these same principals and teachers testified that the integration of the schools has been of little or no benefit to either race. The morale of some has been

shattered, their health has been impaired, and some have separated themselves from the school system by resignation and early retirement. The replacement of these teachers presents a very serious problem to the District schools because white teacher applications have declined materially.

6. Discipline problems and delinquency resulting from the integration of the schools have been appalling. It was unexpected and came as a great shock.

While there were no new discipline problems in the schools that were not materially integrated, the unpreparedness for the turmoil that ensued disrupted the orderly administration of the predominately integrated schools.

This condition had a very pronounced effect in retarding the educational progress of the students.

A continuation of this situation will ultimately destroy the effectiveness of teaching in the integrated schools.

7. That sex problems in the predominately integrated schools have become a matter of vital concern to the parents.

One out of every four Negro children born in the District of Columbia is illegitimate.

The number of cases of venereal disease among Negroes of school age has been found to be astounding and tragic.

The Negro has demonstrated a sex attitude from the primary to high school grades that has greatly alarmed white parents and is a contributing cause of the exodus of the white residents of the District of Columbia.

The integrated schools have found it necessary to curtail greatly, and in many cases eliminate completely social activities formerly considered a vital element in the education of students in the segregated schools.

8. The operation and maintenance of the District schools have been more adequately financed than the average school system. From this standpoint they compare favorably with the outstanding school systems in the Nation. The teachers' salary scale is among the highest.

The 2 years' experience with the opera-

tion of the integrated District school system has conclusively shown that the cost of operating the integrated schools will be substantially increased.

Requests for additional funds by the school administration and the increased budget and capital outlay substantiate this finding.

These demands are being made in the light of the fact that the total school population has not materially increased in the past 3 years.

9. On the average, the Negro students, because of limited achievements, are unable to compete scholastically with the more advanced white students. This condition imposes upon the slower students a psychological barrier denoting inferiority, and manifests itself in social misbehavior.

10. The committee concludes that the integrated school system of the District of Columbia is not a model to be copied by other communities in the United States. On the contrary, it finds that the integrated school system in the District of Columbia cannot be copied by those who seek an orderly and successful school operation.

#### RECOMMENDATIONS

Pursuant to the above-mentioned findings, the subcommittee recommends that legislation be enacted to accomplish—

1. Liberalization of present student transfer policies in order to permit children to be moved from one school to another in accordance with the needs of the child and the desires of the parents.

2. The creation of separate, continuation, and trade schools for pupils of low mental ability incapable of achieving at the high-school level.

3. The establishment of separate schools, with adequately trained personnel, for the housing and teaching of atypical students.

4. The establishment of a separate training school for the housing and teaching of chronic delinquents and incorrigible students.

5. Modification of the present school-attendance laws, so as to confer upon school

officials greater latitude in their authority to deal with individual problem cases.

6. The maintenance of records, statistical data, and other official information relating to the operation of the District of Columbia schools by sex and race.

7. The creation of a high-standard, city-wide, technical high school.

8. Conversion of the District of Columbia Teachers College to a 2-year junior college.

9. The employment of competent and capable teachers to be restricted to applicants who have successfully passed the national teachers' examination.

10. A method by which members of the Board of Education may be removed from their positions for cause.

#### ADDITIONAL VIEWS

We believe that the recommendations contained in subcommittee report, if enacted, would serve to improve public-school education in the District of Columbia.

However, on the basis of information furnished the subcommittee during the hearings, we are of the opinion that the act of integrating the former division I and division II schools has seriously damaged the public school system in the District of Columbia. The evidence, taken as a whole, points to a definite impairment of educational opportunities for members of both white and Negro races as a result of integration, with little prospect of remedy in the future.

Therefore, we recommend that racially separate public schools be reestablished for the education of white and Negro pupils in the District of Columbia, and that such schools be maintained on a completely separate and equal basis.

JAMES C. DAVIS, *Chairman.*  
JOHN BELL WILLIAMS,  
WOODROW W. JONES,  
JOEL T. BROTHILL.

#### OTHER ADDITIONAL VIEWS [NON-SIGNERS]

Since we have not signed the majority report submitted by the staff of the subcommittee, we desire to offer the following observations:

1. We have carefully read the hearings, report,

and the recommendations made by the staff and the subcommittee. There is much in the report that is factual. The statistics speak for themselves, and it is not a record of which anyone can be proud. The report is provocative. It deals with the sordid, headline items almost entirely. We have a feeling that a more objective approach would uncover some good things in the educational and social life of the District schools.

2. The report seems to blame all of the educational deficiencies in our school system entirely on the efforts toward integration. We cannot believe that everything that is wrong with the educational system can be blamed on integration. It is quite probable that many of the unsatisfactory conditions brought to light by the investigation may have been caused by conditions that existed prior to integration, and are due to factors other than integration.

3. In a close reading of the hearings, we must come to the conclusion that the technical staff presented leading questions to a selected group of witnesses. While we do not doubt the honesty or sincerity of the witnesses who testified, the testimony does not appear to be well-balanced, or objective, since persons with views not in accord with those of the counsel were not given full and fair opportunity to testify.

4. While the report shows some preliminary planning had been made for desegregation, it does seem evident that no complete plan had been carefully brought to a conclusion. There did not seem to be a sufficient awareness of the many problems that would be faced by the sudden change. While the Supreme Court decision must be taken as final, we believe it did leave some opportunities for "a little play at the joints" in order to work out the many delicate, emotional, and prejudice-packed problems of integration.

5. It appears to us that several of the legislative recommendations of the subcommittee report are not the proper subject of legislation, but rather should remain administrative decisions. In addition there are a number of the legislative recommendations which we do not believe were covered by the testimony. For example, recommendations numbered 1, 6, and 9 do not appear to be the proper subject for legislation; recommendations numbered 7 and 8 were not sufficiently covered by the testimony to come to any intelligent conclusion.

6. The facts brought to light by this investigation seem to indicate that Negro leaders, and those actively interested in the advancement of the Negro people, have much work to do among the Negro people, and that all of the difficulties attended with integration are not caused by the seemingly uncompromising attitude of the white people.

7. The recommendations of the subcommittee issued subsequent to the original report, "that racially separate public schools be reestablished in the District of Columbia," obviously cannot be done without a constitutional amendment.

A. L. MILLER,  
DEWITT S. HYDE.

**Following the filing of the above Subcommittee report, the Superintendent of Schools of the District of Columbia sent a report to the District Board of Education, on January 4, 1957, commenting on that report. Those comments follow:**

SUPERINTENDENT OF SCHOOLS

Franklin Administration Building  
Thirteenth and K Streets, N.W.  
Washington 5, D.C.

January 4, 1957

To the Members of the Board of Education  
of the District of Columbia

Ladies and Gentlemen:

A report of the special Subcommittee of the District of Columbia Committee of the House of Representatives, under the chairmanship of the Hon. James C. Davis, contains several findings, recommendations, and observations. It is not the intention of the Superintendent of Schools to answer each of these points in detail. Many of the various comments were discussed by the Superintendent in testimony before the Subcommittee and in material submitted to the Subcommittee by the Office of the Superintendent. It does not appear, however, that the testimony of the Superintendent is reflected to any appreciable degree in the findings and recommendations of the Committee.

By way of general comment, since the Committee has recommended a return to separate but equal schools in the Nation's Capital, that recommendation alone seems to indicate the prime purpose of the Committee which is undoubtedly basic to their various findings and recommendations.

It is claimed by the Committee that the schools were desegregated with undue haste, that there was no preparation for the change, and that the experiences of other cities were not studied. In this connection it is important

to point out that testimony was given by the Superintendent at the hearings concerning the various steps of preparation for this change. In 1953, the Superintendent had issued a Curriculum Guide on Intergroup Education approved by the Board of Education and designed to reduce intergroup misunderstandings and to promote wholesome intergroup relationships. The testimony shows that prior to the decision of the Supreme Court, the staff officers with the Superintendent, in a series of many conferences and work sessions, studied for two years the means of bringing about an integrated school system. This was done at the insistence of the Board of Education and because of the belief of the Superintendent and the officers that a plan must be prepared in the event the Supreme Court should render a decision making integration necessary.

In these two years of study the officers secured reports of the experiences of other school systems and took these into consideration. They brought to Washington nationally recognized experts who had had direct experience in various states and communities. Some of these experts conducted a series of workshops for members of the Board of Education, the school officers, and teachers and they were available for consultation with the officers concerned. Following these workshops the faculty groups in the various schools carried on the studies of intercultural relations and the possible effects of a Supreme Court decision that the schools must be integrated. This study was particularly intensified in those schools which would be expected to be most affected by an integration order.

In addition to this and still prior to the Supreme Court decision, the Board of Education

invited individual citizens and civic groups to suggest techniques of integration to be adopted should the Supreme Court determine that integration must be established. Furthermore, the Board of Education held hearings on the same subject and the suggestions made were given serious consideration by the Superintendent in developing the plan which was eventually recommended to the Board of Education. All of these steps in preparation were prior to and in anticipation of the Supreme Court decision which was rendered on May 17, 1954.

At a special meeting of the Board of Education held on May 25 and adjourned to June 2, the Board of Education adopted a statement of policy drafted by a committee of the School Board and agreed upon the plan for integration which the Superintendent had developed during this two-year period of study.

It is contended that the Board of Education proceeded at an unwarranted speed. In this connection it should be noted that the Superintendent and the Board of Education have been criticized by people who live here in the District of Columbia and whose children might be concerned on one of two counts—either too great a degree of gradualism in the plan or because the plan moved too swiftly. It is the belief of the Superintendent and the Board of Education that the adopted plan did not follow either extreme but was a middle-of-the-road plan.

Several elements were introduced to provide for a somewhat gradual change from a segregated to an integrated school system. In the first place, a plan was approved which made it possible for students to remain in their original schools until the completion of the elementary school, the junior high school, or the senior high school, and even at the present time, many students are remaining in their original schools regardless of boundaries because of this provision. In the second place, a special committee was established to consider all so-called hardship cases which might result from assignment to schools according to boundaries. That committee has operated continuously since the plan was started and many cases have been heard in which the children have been permitted to attend schools other than those within the boundaries of which the individuals live.

During the entire first year the program was limited to these steps:

1. The transfer of approximately 2,900 stu-

dents from formerly colored schools to formerly white schools to relieve excessive overcrowding.

2. The application of boundaries to new students only.
3. The requirement that the February graduates of the junior high schools attend senior high schools according to their boundaries.

Those who claim that the transition took place too quickly should consider the alternatives. Undoubtedly, had the Board of Education not acted promptly, there would have been repeated and intensified tensions and demonstrations due to the excessively overcrowded conditions in the colored schools when there was available space in the white schools. A delay in complying with the Supreme Court decision would have necessitated the transfer of more buildings from white to colored use. During the last several years of segregation, 21 schools had been transferred and in each case there was controversy, dissatisfaction, and unrest. Had the Board not acted promptly, the McKinley High School, at least one junior high school, and several elementary schools would have been transferred to colored occupancy because it would have been untenable to require colored children to continue to pass half-filled white schools on their way to overcrowded colored schools. In addition to the transfer of buildings, it would have been necessary to transfer many teachers' salaries from the then Division 1 to Division 2.

During the last years of segregation, eight lawsuits were instituted against the Board of Education and the Superintendent. It would be very normal to expect that after the decision of the Supreme Court more lawsuits would have been filed if no action had been taken in connection with the decision.

Furthermore, those who claim that integration was too rapid failed to suggest a gradual program which would be practical.

Should the plan advocated be to integrate the kindergarten, then the first grade, then the second grade, and so forth in subsequent years, there would be the objection that families would be divided, that buildings would operate on both plans, that it would take thirteen years to accomplish the program, and that in the meantime there would be continued overcrowding and a shortage of teachers and buildings for colored pupils. Such a plan would have resulted in pro-

longed, continuous, and increasing tensions and disturbances. In other words, the schools and the community would have been continuously disturbed over a long period of time because the issue had not been faced squarely at the beginning.

It has never been contended by the Superintendent or the Board of Education that the changeover has worked perfectly. On the contrary, it has been freely admitted that problems have developed which need to be solved and which can eventually be alleviated. Many of the problems listed by the Davis' Committee are not problems which resulted from the integration of the schools but rather which have been brought to light by the merging of the two school systems. For example, the Committee claims that there has been an accelerated movement of the white population to the suburbs. In this connection the Committee seems to have ignored the testimony of the Superintendent of Schools and materials supplied from the Research Department of the schools which show that the migration of the white population to the suburbs has been going on for many years. This shift of population to the suburbs has been happening not only in Washington but in every large city.

It is undoubtedly true that some families did move to Maryland or Virginia in order to avoid the integration of the schools. It is not possible to prove that the decrease in the white population in the schools is due solely to integration. The Committee was supplied with a table which showed that since 1939 there has been a marked decrease in the white enrollment and an even greater increase in the colored enrollment in the schools.

It is contended by the Committee that sex problems in the integrated schools have aroused parents and have contributed to the exodus of the white population from the city. The reported number of illegitimate births and cases of venereal disease among school-age children are indeed astounding and tragic. It cannot be claimed, however, that these conditions are the results of integration of the schools. The Committee was supplied the statistical data on these points showing that the number of illegitimate births, for example, has not increased appreciably in the last seven or eight years. Furthermore, the school authorities have no evidence of irregular behavior involving white and colored students together.

The Committee contends that lowered teacher morale has resulted in separations from the service through resignations and early retirements. Here again the Committee seems to ignore the testimony of the Superintendent and the statistical material submitted by him to the Committee.

It is undoubtedly true that some individuals have separated from the service as a result of integration. However, it is also true that the total number of separations has not been significantly increased since integration was established. The statistics show that the number of resignations of probationary and permanent teachers for each of the past five years has fluctuated from 100 in 1951-1952, to 81 in 1952-1953, down to 70 in 1953-1954—the last year of segregation—up to 90 in 1954-1955, and back to 100 in 1955-1956.

Of the total number of resignations, it is significant that among white teachers the resignations in 1951-1952 numbered 88; in 1952-1953, 63; in 1953-1954, 62; in 1954-1955, 72—the first year of integration; and in 1955-1956, 70—the second year of integration.

The voluntary retirements for the same years have been 60, 83, 56, 60 and 50. There is no indication in the record that the numbers of resignations or voluntary retirements have been increased due to the processes of integration.

The Committee contends that the Public Schools of Washington are more adequately financed as compared with other school systems.

Among the 18 largest cities in America, in March, 1956, the per pupil expenditures in the District of Columbia were \$305.46, placing Washington 18th which, of course, means that 12 of the 18 cities had a higher per pupil expenditure than Washington. These facts were reported to the Committee.

The Committee points out that demands for additional funds are being made even though school population has not increased materially in the last three years. It is assumed that the Committee means from October, 1954, to October, 1956. As a matter of fact, in those three years the enrollment has increased by 3,008 students, requiring additional teachers and housing, and representing a percentage increase of 2.8 over the 1954 enrollment.

The increased funds which have been requested are not due to the integration of the schools but rather to the steadily increasing enrollment and backlog. It can be definitely shown

that under integration it has been possible to make more complete and satisfactory utilization of building facilities and teacher assignments than under segregation.

The Committee concludes that the Washington experience is not a model to be followed by other communities. It has never been contended by the Superintendent or the Board of Education that the plan in Washington was established as a model for the Nation. On the contrary it has been repeatedly stated that it was designed for this community only. The problems and circumstances in various communities differ widely. Each community will need to work out its problems in the light of its own particular circumstances.

The Superintendent has consistently refused to participate in discussion of integration in other communities because he is unwilling to give the impression that the Washington plan was suitable to be followed elsewhere.

The report of the Committee records several recommendations which are as follows:

1. "Liberalization of present student transfer policies in order to permit children to be moved from one school to another in accordance with the needs of the child and the desires of the parents."

As has been previously reported many individual pupils have been transferred to schools outside the areas in which they live when their best interests have been involved. A more liberal boundary policy would, of course, apply to the enrollments of both colored and white students and would leave the administration without adequate control of total enrollment in any school.

2. "The creation of separate, continuation, and trade schools for pupils of low mental ability incapable of achieving at the high school level."

Plans have been formulated to establish a city-wide school for boys who need a shop-centered type of program and consideration is being given to the establishment of a similar school for girls.

3. "The establishment of separate schools, with adequately trained personnel, for

the housing and teaching of atypical students."

Presently children designated as atypical are assigned to special classes within their own schools. It would not be to the best interest of the children to concentrate all such classes in separate buildings. These children should not be deprived of the opportunity of association with more able children.

4. "The establishment of a separate training school for the housing and teaching of chronic delinquents and incorrigible students."

The establishment of such an institution would involve the Welfare Department and the Court rather than the schools.

5. "Modification of the present school-attendance laws, so as to confer upon school officials greater latitude in their authority to deal with individual problem cases."

While it may be desirable that the schools have authority to exclude students, it nevertheless must be borne in mind that such exclusions result in students being turned loose on the streets with the greater likelihood that they will become serious burdens on society.

6. "The maintenance of records, statistical data, and other official information relating to the operation of the District of Columbia Schools by sex and race."

Under existing Board policy, a racial count is taken in October of each year. The Superintendent questions the need for any further racial records. It is believed that practices in other cities where schools are integrated do not include the keeping of racial, religious, or political statistics.

7. "The creation of a high-standard, city-wide, technical high school."

As one of the first steps in the desegregation program, the Board of Education began the merger of the Armstrong and McKinley Technical High Schools and announced its in-

tention of seeking appropriation to remodel the McKinley Building. That appropriation has been secured and the work is now in progress, to be finished by September, 1957.

**8. "Conversion of The District of Columbia Teachers College to a 2 year junior college."**

The plans of the Board of Education call for the ultimate conversion of The District of Columbia Teachers College to a Municipal College, including a junior college and a teacher training department.

**9. "The employment of competent and capable teachers to be restricted to applicants who have successfully passed the National Teachers' Examination."**

The Board of Education is in its second year of the trial use of the National Teachers' Examination for elementary school teachers. At this time it is not possible to expand the plan into the secondary schools as examinations have not yet been set up to cover all departments of instruction in our secondary schools. Examinations prepared and administered by the Board of Examiners of the Public Schools, as provided by law, are designed to create lists of candidates who are qualified as competent.

**10. "A method by which members of the Board of Education may be removed from their positions for cause."**

This proposal does not fall within the jurisdiction of the Superintendent for comment.

Under additional views, the majority of the Committee made this recommendation:

"We recommend that racially separate public schools be reestablished for the education of white and Negro pupils in the District of Columbia, and that such schools

be maintained on a completely separate and equal basis."

The Superintendent has previously commented upon this recommendation by stating that, in his judgment, a return to separate but equal schools would be illegal and if attempted would result in chaotic upheaval within the schools of the District of Columbia.

In summary, the Superintendent has repeatedly stated that the process of desegregating the schools is quite different from the process of integrating two school systems which have previously been entirely separate. The desegregation process involved moving people and things, the process of integration involves the bringing together of two school systems in order to produce a commonality of practice and achievement. It is freely admitted that there are still many unsolved problems in connection with the integration of the schools. The administration states with firmness, however, that progress is being made in the solution of these problems and that the professional staff in the schools is dedicated to this solution and to the further improvement of integration of the schools.

At the conclusion of the Superintendent's testimony before the Subcommittee, Congressman Williams asked what the Committee might recommend legislatively which would have a tendency to improve the District of Columbia Schools. The Superintendent replied that our most pressing need is for more teachers so that classes can be smaller. We need more teachers for special classes, more supervisors and an expanded testing department and to relieve serious overcrowding we need more school buildings and we need them more rapidly than is possible under the current pay-as-you-go program.

The Superintendent further stated, "If the Committee is sincerely seeking for things that will help, these are the things that are of primary importance."

Sincerely yours,  
Hobart M. Corning  
Superintendent of Schools

## EDUCATION

### Public Schools—Tennessee

Governor Clement of Tennessee, on January 9, 1957, appeared before a joint session of the Tennessee General Assembly to propose five bills to permit local school authorities to act with respect to questions of racial integration in the public schools. These bills are designed to (1) authorize the establishment of separate schools for pupils whose parents or guardians voluntarily elect that they attend schools only with members of their own race, (2) a "School Placement Law," (3) an amendment to present law authorizing the transfer of pupils between school systems, (4) authorization for the joint operation of school facilities, and (5) an amendatory bill dealing with transportation of pupils. The text of these bills, as enacted, is set out below.

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**Public Chap. No. 11, acts of the 1957 Session of the Tennessee General Assembly, approved January 25, 1957, authorizes the establishment of separate schools for pupils whose parents or guardians voluntarily elect that they attend school only with members of their own race.**

AN ACT to authorize boards of education of counties, cities and special school districts to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That boards of education of counties, cities and special school

districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race.

Section 2. *Be it further enacted,* That this Act shall take effect from and after its passage, the public welfare requiring it.

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**Public Chap. No. 13, acts of the 1957 Session of the Tennessee General Assembly, approved January 25, 1957, provides a "Pupil Assignment Act" to provide for the assignment of pupils to public schools by county or city boards of education. The boards are provided with criteria to be used in making assignment of pupils. The bill provides for the conduct of hearings in cases of protest by the parents or guardian and for court review of the board's decisions.**

AN ACT to regulate the assignment, admission and transfer of pupils; to prescribe the method of making such assignments by local school boards; to empower local school boards to promulgate rules and regulations; to provide for tests and surveys; to provide for hearings; to provide for subpoenas and for punishment for contempt; to authorize the employment of counsel, examiners, court reporters and other personnel and provide for the payment from public funds of fees, costs, expenses and other liabilities arising under this Act; to confer all powers necessary for the enforcement and administration of this Act; to provide for appeals from the decisions of local school boards; and to define liability of school officials for libel, slander and other actions, civil and criminal.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the board of education of each county, city and special school district, with respect to the schools under its jurisdiction, is authorized and required to provide for the enrollment in a public school of each child who is eligible for enrollment within the schools of said county, city or special school district. Except as otherwise provided by this Act, the authority of each and every local school board in the matter of enrollment of pupils within its county, city or special school district shall be full and complete and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such county, city or special school district other than

the public school to which such pupil may be assigned pursuant to the rules, regulations and decisions of said board of education. Subject to review as provided in this Act, the board of education may exercise the powers and duties granted by this Act directly or may delegate its authority to other persons employed by the board under such rules and regulations as the board may adopt, subject to final decision and action by the board itself.

*Section 2. Be it further enacted,* That in determining the particular public school to which pupils shall be assigned, the board of education may consider and base its decision on any one or more of the following factors: available room and teaching capacity in the various schools; the geographical location of the place of residence of the pupil as related to the various schools of the system; the availability of transportation facilities; the effect of the enrollment on the welfare and best interests of such pupil and all other pupils in said school as well as the effect on the efficiency of the operation of said school; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualifications of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic program of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the effect of any disparity between the physical and mental ages of any pupil to be enrolled, especially when contrasted with the average physical and mental ages of the group with which the pupil may be placed; the sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological

relationships with other pupils and with teachers; the choice and interests of the pupil; the sex, morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor; together with any and all other factors which the board may consider pertinent, relevant or material in their effect upon the welfare and best interest of the applicant, other pupils of the county, city or special school district as a whole and the inhabitants of the county, city or special school district.

*Section 3. Be it further enacted,* That after the effective date of this Act, each school child who has heretofore attended a public school and who has not moved from the county, city or special school district in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled in a different school by the local board of education pursuant to the provisions of this Act.

*Section 4. Be it further enacted,* That in the exercise of the authority conferred by this Act, the boards of education may prescribe general rules governing admission to schools within their jurisdictions, subject to the provisions of this Act, and may adopt such other reasonable rules and regulations as in the opinion of the board shall best accomplish the purposes of this Act.

*Section 5. Be it further enacted,* That the board is authorized to prescribe a date reasonably in advance of the opening of school for the filing of applications for admission or transfer and to refuse to consider applications filed after such date for the ensuing school year.

*Section 6. Be it further enacted,* That in determining and applying the general rules for the admission of children to the public schools, the board through its officers and employees may make investigations, conduct surveys and create and appoint advisory committees and study groups to assist in surveys and plans with respect to the enrollment of children within its jurisdiction, and may conduct such tests as it may consider advisable in determining the schools to which pupils shall be assigned or the grades, classes or courses of study within a school to which pupils should be assigned or enrolled.

*Section 7. Be it further enacted,* That, in as-

signing students, the board of education may give individual written notice of assignment on each pupil's report card or by written notice by any other feasible means to the parent, or may give notice by publication.

Section 8. *Be it further enacted*, That both parents, if living, or the parent, guardian or legal custodian of any child so assigned who is dissatisfied with the assignment of such child may, within ten days of the order making said assignment, make written application to the board for a hearing before the board as to the reasonableness of said assignment and asking for a transfer to another school. Said application for transfer shall state the specific reasons why the applicant contends that the child should not attend the school assigned and the specific reasons why the child should be assigned to the different school named in the application. Upon the receipt of such application for hearing, the board shall set a date for the hearing of the protest and such hearing shall be held within a reasonable time after receipt of the written application for the hearing. Written notice of the date and place of the hearing shall be given by the board or its secretary to the parents, guardian or legal custodian of such child by mailing a notice of hearing to said party at his last known mailing address at least ten days before the date of the hearing. The applicant shall be entitled to appear in his own behalf or to be represented by counsel upon the hearing of such protest.

Section 9. *Be it further enacted*, That the board shall consider and decide each individual case separately on its merits; and its decision shall be based upon a consideration of the factors set forth in Section 2 of this Act. Within a reasonable time after the completion of the hearing, the board shall enter a written order either granting or denying the protest. A copy of the order and the findings of the board shall be mailed by the board or its secretary to all parties appearing at the hearing at their last known mailing address within five days from the date of such order.

Section 10. *Be it further enacted*, That in conducting such hearings as provided in this Act, the board shall not be bound by the rules of evidence applicable in a court, but it may admit and give probative effect to any evidence which possess such probative value as would entitle

it to be accepted by reasonable prudent men in the conduct of their affairs; provided, however, that the board shall give effect to the rules of privilege recognized by law; and provided further that the board may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. All evidence including records and documents in the possession of the board of which it desires to avail itself, shall be offered and made a part of the record in the cause. No factual information or evidence other than that contained in the record shall be considered in the determination of the cause. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference. Each party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. The board may take notice of judicially cognizable facts. In addition to the oral testimony of witnesses appearing at the hearing, the testimony of witnesses may be taken by deposition or upon interrogatories.

Section 11. *Be it further enacted*, That in conducting hearings under this Act, the board shall have the power to administer oaths and affirmations and the power to issue subpoenas in the name of the State of Tennessee to compel the attendance of witnesses and the production of documentary evidence. All such subpoenas shall be served by the sheriff or any deputy of the county to which the same is directed; and such sheriff or deputy shall be entitled to the same fees for serving such subpoenas as in the case of the service of subpoenas from a court of record of the state. In the event any person fails or refuses to obey a subpoena issued hereunder, any court of record of this state within the jurisdiction of which the hearing is held or within the jurisdiction of which said person is found or resides, upon application by the board or its representatives, shall have the jurisdiction to attach the body of such person and compel him to appear before the board and to give testimony or produce evidence as ordered; and any failure to obey such an order of the court may be punished by the court issuing the same as a contempt thereof.

Witnesses shall be entitled to the same fees as provided by law for witnesses in courts of record, which fees shall be paid as a part of the costs of the proceeding.

Section 12. *Be it further enacted*, That in con-

ducting hearings under this Act the board may employ counsel as provided in Section 22 of this Act to appear at and participate in such hearings on behalf of the board. The board or its counsel may introduce evidence in support of the actions of the board. Members of the board may cross-examine any witness testifying at such hearings.

Section 13. *Be it further enacted*, That the burden of proof in all proceedings under this Act shall be upon the person challenging the action of the board.

Section 14. *Be it further enacted*, That the board of education is authorized to designate one or more of its members or one or more competent examiners to conduct any such hearings, and to take testimony, and to make a report of the hearings to the entire board for its determination. Before the board shall enter a final order in such cases the members thereof shall personally consider the entire record and the board shall make its decision on the basis thereof.

Section 15. *Be it further enacted*, That both parents, if living, or the parent, guardian or legal custodian of a child so assigned by final order of the board, may, at any time within thirty days from the date of the final order, obtain a judicial review of the order by filing a petition for review in the Chancery Court of the County where said board of education is located. The petition shall state briefly the issues involved in the cause, the substance of the order of the board, and the respects in which the petitioner claims the order of the board is erroneous, and pray for an accordant review. The petition shall be addressed to the presiding chancellor and shall name the board of education as defendant. The petitioner shall file with his petition a copy of the decision of the board of education and a transcript of the proceedings and evidence before the board, authenticated by the person presiding over the hearing. In the event a copy of the transcript is not available within the period provided herein for the filing of such petitions, the court may, upon application of the petitioner within the time prescribed herein, grant an extension of the time within which said petition may be filed.

The petitioner shall give bond for costs as in other chancery suits or oath of paupers in lieu thereof.

Upon the filing of such petition the Clerk and Master shall immediately send by registered or certified mail to the chairman of the board, a notice of the filing of said petition and a certified copy thereof. In lieu of notice by registered or certified mail subpoena to answer may be personally served on each defendant as in other chancery cases.

Section 16. *Be it further enacted*, That the filing of such a petition for review shall not suspend or supersede an order of the board; nor shall the court have any power or jurisdiction to suspend or supersede an order of the board issue under this Act prior to the entry of a final decree in the proceeding, except that the court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for review, after a preliminary hearing, and upon a prima facie showing by the petitioner that the board has acted arbitrarily, fraudulently or unlawfully to the manifest detriment of the child who is the subject of the proceeding.

Section 17. *Be it further enacted*, That the defendants named in said petition shall make defense as in other chancery cases within thirty days from the date of the filing of said petition, unless the time be extended by the court. Amendments may be granted as in other chancery proceedings. The cause shall stand for trial and shall be heard and determined at the earliest practicable date and shall be heard exclusively upon the proof introduced before the board contained in the transcript. No person shall be authorized to offer or introduce new or additional evidence before the court, except that in cases of alleged irregularities in procedure before the board, not shown in the record, testimony thereon may be taken before the court; provided, however, that if, before the date set for the hearing, application is made to the court for leave to present additional evidence going to the merits of the cause, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the board, the court may order that the additional evidence be taken before the board upon such conditions as the court deems proper. Upon hearing such additional evidence, the board may modify its findings and decisions by reason thereof and shall file with the court, to become a part of the

record, the additional evidence together with any modifications or new findings or decisions.

Section 18. *Be it further enacted*, That upon the hearing, the court may dismiss the petition or vacate the order complained of in whole or in part; but, in case the order of the board is wholly or partly vacated, the court may, at its discretion, remand the case to the board of education for further proceedings not inconsistent with the decree of the court. The findings of fact of the board of education shall be considered final, if supported by substantial evidence on the entire record. The review of the Chancery Court as herein provided for shall not extend further than to determine whether the board of education has acted illegally, fraudulently or in excess of its jurisdiction, including a determination of whether the order of the board under review violated any right of the aggrieved party under the Constitution of the United States or the Constitution of Tennessee.

The chancellor shall reduce his findings of fact and conclusions of law to writing and make them a part of the record.

Section 19. *Be it further enacted*, That from the final decree of the Chancery Court, an appeal may be taken by both parents, if living, or by the parent, guardian or legal custodian of the child in question, or by the board of education to the Court of Appeals or Supreme Court in the same manner and under the same rules as other appeals are taken from final decrees in Chancery cases.

Section 20. *Be it further enacted*, That the rules of pleading, practice and procedure ordinarily followed in Chancery cases will be followed in the review of orders of boards of education hereunder, except as otherwise provided in this Act.

Section 21. *Be it further enacted*, That actions for the review of the decisions of the board of education in assigning a child to a school shall be filed and maintained only by both parents, if living, or by the parent, guardian or legal custodian of the child so assigned. The court

shall consider and decide each individual case separately on its merits. The assignment of each child shall be considered to be an individual case, and no class actions shall be maintained.

Section 22. *Be it further enacted*, That each board of education shall be authorized to employ counsel to represent the board in any matters arising under this Act, to employ court reporters for the purpose of preserving evidence at hearings conducted under this Act and preparing transcripts thereof, and to employ such other personnel and incur such other expenses as the board may find to be necessary for the efficient administration of this Act. Any judgments, liabilities and court costs adjudged against the board of education or the members thereof, the fees of attorneys employed by the board under this Act, and any and all other expenses and liabilities incurred under this Act, shall be the obligation of the county, city or special school district involved, and shall be paid from the funds of such county, city or special school district.

Section 23. *Be it further enacted*, That no board of education or member thereof, nor its agents or examiners, shall be answerable to charge of libel, slander or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statements made in the course of the proceedings or deliberations provided for under this Act.

Section 24. *Be it further enacted*, That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared, that this Act would have been adopted even if such unconstitutional or void matter had not been included therein.

Section 25. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

**Public Chap. No. 9, acts of the 1957 Session of the Tennessee General Assembly, approved January 25, 1957, makes amendments to prior law so as to facilitate the transfer of pupils between school systems.**

AN ACT to amend Sections 49-1006, 49-1108 and 49-1701 of Tennessee Code Annotated.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That Section 49-1701 of Tennessee Code Annotated be and the same hereby is amended so as to read as follows:

**"49-1701. Public Schools free—Transfer of pupils.—**The public schools shall be free to all persons above the age of six (6) years, or who will be (6) years of age on or before December 31st, following the beginning of any school year, residing within the State. Boards of education of counties, cities and special school districts shall be authorized in their discretion to admit pupils from outside the counties, cities and special school districts, and to arrange for the transfer of students residing within said counties, cities and special school districts to schools located elsewhere; and to enter into agreements and arrangements with other local boards of education for the admission or transfer of pupils from one school system to another. Such admissions and transfers from one school system to another may be made with or without transfer of school funds and upon such terms and conditions as may be agreed upon by the cognizant boards of education."

Section 2. *Be it further enacted,* That Section

49-1006 of Tennessee Code Annotated be and the same hereby is amended by striking said section and by inserting in lieu thereof the following:

**"49-1006. Pupils from other counties.—**Any county board of education may admit to the elementary schools pupils resident in another county, as provided in Section 49-1701."

Section 3. *Be it further enacted,* That Section 49-1108 of Tennessee Code Annotated be and the same hereby is amended by striking said section and by inserting in lieu thereof the following:

**"49-1108. Pupils attending outside county of residence.—**high school pupils residing in one county may be admitted to the high schools of another county, as provided by Section 49-1701."

Section 4. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared, that this Act would have been adopted even if such unconstitutional or void matter had not been included therein.

Section 5. *Be it further enacted,* That this Act shall take effect from and after its passage, the public welfare requiring it.

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**Public Chap. No. 12, acts of the 1957 Session of the Tennessee General Assembly, approved January 25, 1957, authorizes the establishment and operation of joint schools by two or more boards of education.**

AN ACT to authorize and empower boards of education to establish, maintain and operate public schools jointly with other boards of education by entering into contracts binding upon the respective counties, cities and special school districts and the boards of education thereof; to confer upon counties, cities and special school districts and the boards of education thereof powers necessary and expedient for the accomplishment of the pur-

poses of this Act; to provide for the administration of schools established hereunder; to authorize boards of control and to provide for their powers and jurisdiction; and to require the Attorney General and the Commissioner of Education of Tennessee to advise and assist in the preparation, execution and interpretation of contracts hereunder.

Section 1. *Be it enacted by the General As-*

*sembly of the State of Tennessee,* That the boards of education of any two or more school systems, county, city or special school district, are authorized and empowered to establish, maintain and operate a public school or schools jointly by entering into contracts for that purpose. Upon the execution of contracts under this Act by the respective boards of education, the same shall be binding upon the said boards of education and upon the counties, cities and special school districts involved.

Section 2. *Be it further enacted,* That counties, cities and special school districts, are authorized and empowered to levy taxes, issue bonds, appropriate and expend funds, acquire property through purchase or by the exercise of eminent domain, employ teachers, provide for the transportation of school children, and do any and all other acts necessary or expedient for entering into and consummating such contracts and for establishing, maintaining and operating such joint schools in the same manner and to the same extent as they may be authorized to do for establishing, maintaining and operating other public schools. Existing school plants and facilities may be used, or new plants may be acquired or constructed.

Section 3. *Be it further enacted,* That all schools established maintained and operated pursuant to a contract entered into under this act shall be considered for all purposes as integral parts of the school systems of each of the counties, cities or special school districts which are parties to the said contract; and the boards of education of each county, city or special school district which are parties to such contracts shall have the same powers with respect to the assignment, placement, expulsion, suspension and transfer of pupils residing in their respective jurisdictions in and to such schools and with respect to the employment and assignment of teachers for such schools as they may possess with respect to other schools under their supervision, control and jurisdiction, except insofar as such powers may be limited by the provisions of said contracts.

Section 4. *Be it further enacted,* That the administration of schools established, maintained and operated pursuant to a contract entered into under this Act may be placed under the

board of education of the county, city or special school district in which such school is located; or the administration of such schools may be placed under a board of control created pursuant to the terms of said contract. In the event such a board of control is created, it shall elect its own chairman and secretary and may designate as ex officio secretary the superintendent of schools of the county, city or special school district in which said school is located; and any such board of control shall exercise all the administrative powers and functions with respect to such school that county boards of education are authorized to perform and exercise with respect to the operation of county schools. Provided, however, such schools may be administered by such other persons and in such other manner as the terms of the said contract may provide. The county trustee or treasurer or other fiscal or disbursing officer, as the case may be, of the county, city or special school district in which such school is located, or such other disbursing officer as may be designated by the contract, shall have the same powers, rights and duties with respect to the receipt, protection and disbursement of the funds allocated to or for the use of such school as provided by law for other school funds.

Section 5. *Be it further enacted,* That it shall be the duty of the Attorney General of the State of Tennessee and of the Commissioner of Education of the State of Tennessee, upon the request of any county, city or special school district or the board of education thereof, to render advice and assistance in the preparation, execution and interpretation of contracts proposed or executed under this Act.

Section 6. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared, that this Act would have been adopted even if such unconstitutional or void matter had not been included therein.

Section 7. *Be it further enacted,* That this Act shall take effect from and after its passage, the public welfare requiring it.

**Public Chap. No. 10, acts of the 1957 Session of the Tennessee General Assembly, approved January 25, 1957, makes amendments to prior law with respect to free transportation for public school pupils.**

**AN ACT** to amend Section 49-2201 of Tennessee Code Annotated, dealing with the power of boards of education to provide transportation facilities for school children.

**Section 1. Be it enacted by the General Assembly of the State of Tennessee,** That Section 49-2201 of Tennessee Code Annotated which reads as follows:

**"49-2201. Power of boards to provide transportation.—Boards of education may provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the nearest school of appropriate race, grade, and type; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the nearest school of appropriate race, grade, and type, but the county shall not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the nearest school of appropriate race, grade, and type; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education with the approval of the state commissioner of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court."**

be and the same is hereby amended by striking the entire section and substituting in lieu thereof the following:

**"49-2201. Power of boards to provide transportation.—Boards of education may provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education with the aproval of the state commissioner of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court."**

**Section 2. Be it further enacted,** That this Act shall take effect from and after its passage, the public welfare requiring it.

## TRANSPORTATION

### Buses—Alabama

Because of outbreaks of violence attending the operation of city buses in Montgomery, Alabama, the city Board of Commissioners adopted a series of resolutions curtailing the operations of the city bus lines. Those resolutions follow:

[*Resolution adopted December 29, 1956*]

#### A RESOLUTION

WHEREAS, certain buses operated by the Montgomery City Lines, Inc., have been fired into on four occasions within the past three days; and

WHEREAS, one such incident has resulted in serious personal injury; and

WHEREAS, all such incidents have occurred after dark; and

WHEREAS, the Board of Commissioners of the City of Montgomery has determined an emergency exists and that it is necessary for the protection of health, life and property in the City of Montgomery that definite action be taken in an attempt to prevent further disturbances of a like nature:

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, ALABAMA, as follows:

1. That the privilege of the Montgomery City Bus Lines, Inc., to operate buses after the five (5) o'clock, P.M. run be, and the same is hereby suspended effective immediately. Buses may be operated on those runs leaving downtown Montgomery on what is generally known as the five (5) o'clock P.M. run. There shall be no operation of buses after such runs.

2. That the suspension shall remain in effect for the nights of Saturday, December 29, 1956, Sunday, December 30, 1956, Monday, December 31, 1956 and Tuesday, January 1, 1957.

[*Resolution adopted January 2, 1957*]

#### A RESOLUTION

WHEREAS, in the opinion of the Board of Commissioners of the City of Montgomery, Alabama, the emergency specified in the resolution adopted by this Board on December 29, 1956, continued:

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, ALABAMA, that the suspension set out in paragraph 2 of said resolution be and the same is continued for the nights of January 2, 1957 thru January 8, 1957, unless revoked prior to January 8, 1957.

[*Resolution adopted January 10, 1957*]

#### A RESOLUTION

WHEREAS, the Board of Commissioners of the City of Montgomery, Alabama, has determined that an emergency exists and that it is necessary for the protection of the life, health and property of the citizens of the City of Montgomery, that bus service be temporarily stopped:

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, ALABAMA, as follows:

1. That the privilege of the Montgomery City Lines, Inc. of operating busses on the streets of the City of Montgomery, be and the same is hereby suspended until further action of the Commission.

[*Resolution adopted January 15, 1957*]

#### A RESOLUTION

BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, ALABAMA, as follows:

1. That the privilege of the Montgomery City Lines, Inc., to operate busses on the streets of the City of Montgomery be restored to the extent that all daylight operations be restored, effective January 16, 1957.

2. That the privilege of the Montgomery City Lines, Inc., to operate busses after the five fifteen (5:15) P.M. run be and the same is hereby suspended effective immediately. That no busses shall be operated on the streets after those leaving Court Square at or before 5:15 P.M.

## TRANSPORTATION

### Buses—Florida

**Because of outbreaks and threatened outbreaks of violence attending the efforts of Negroes in Tallahassee, Florida, to secure non-segregated seating on city buses, the governor of Florida issued a proclamation on January 1, 1957, suspending operations of the city bus line. The suspension was withdrawn on January 11, 1957. These proclamations follow:**

#### Proclamation

STATE OF FLORIDA  
EXECUTIVE DEPARTMENT  
TALLAHASSEE

WHEREAS, there have occurred in Tallahassee, and in Leon County, Florida, assemblies of White and Negro citizens at which inflammatory statements regarding the use of the public transportation facilities operated by the Cities Transit Company in Tallahassee have been made, which statements have had the calculated effect of inspiring violence or overt threats of violence to the persons and property of the citizens of Tallahassee and Leon County, and to the peace, good order and tranquillity of said area; and

WHEREAS, such acts and the conditions resulting therefrom have created a climate of racial tension between the White and Negro citizens of Leon County, culminating in acts of violence and destruction of property, and which seriously threaten the lives and well being of citizens of both races as well as the peace, tranquillity and good order of the community; and

WHEREAS, the continued operation of said public transportation facilities under conditions now existing in Tallahassee may well endanger life, limb and property of the citizens residing therein, and will cause or tend to cause further breaches of the peace and will endanger the peace and good order of society; and

WHEREAS, by reason of the foregoing an emergency exists in Tallahassee and Leon County, Florida.

NOW, THEREFORE, I, LEROY COLLINS, by virtue of the authority vested in me as Governor of the State of Florida, do proclaim that an emergency exists in the City of Tallahassee and the County of Leon, and do hereby order:

1. That Cities Transit Company do imme-

dately, upon promulgation of this proclamation, suspend the operation of its public transportation facilities in the City of Tallahassee, Florida.

2. That this order shall remain in effect until revoked by further order.

3. That this proclamation shall be filed forthwith in the office of the Secretary of State for recording.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capital, this 1st day of January, A.D. 1957.

s/LeROY COLLINS  
GOVERNOR

#### Proclamation

STATE OF FLORIDA  
EXECUTIVE DEPARTMENT  
TALLAHASSEE

WHEREAS, on the first day of January, 1957, I, LeRoy Collins, as Governor of Florida, issued a proclamation declaring the existence of an emergency in Tallahassee and Leon County, Florida, by reason of the matters and things recited and set forth in said proclamation, and by virtue of which I ordered Cities Transit Company to suspend the operation of its public transportation facilities in the City of Tallahassee until further ordered; and

WHEREAS, the public convenience and necessities of the citizens of Tallahassee require the resumption of public transportation facilities at the earliest practicable time consistent with the welfare of the community and the peace and good order of society; and

WHEREAS, it is possible to resume orderly operation of public transportation facilities if the citizens of Tallahassee and Leon County, in a

spirit of good will and in acceptance of the responsibilities of good citizenship resting upon them in this period of misunderstanding and racial tension, will do all that is within their power to so conduct themselves as to avoid further disorder and to preserve law and order, peace and harmony.

NOW, THEREFORE, I, LEROY COLLINS, by virtue of the authority vested in me as Governor of the State of Florida, do hereby revoke said proclamation of January 1, 1957, and do hereby authorize Cities Transit Company to resume operation of its public transportation facilities in Tallahassee and Leon County, Florida.

IT IS HEREBY FURTHER ORDERED  
THAT:

1. This order shall remain in effect until revoked by further order and shall become effective at 4 p.m. on January 11, 1957.
2. This proclamation shall be filed forthwith in the office of the Secretary of State for recording.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capital, this 11th day of January, A.D. 1957.

s/LeRoy Collins  
GOVERNOR

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## EMPLOYMENT

### Fair Employment Laws—Iowa

The City Council of Des Moines, Iowa, on April 13, 1956, adopted an ordinance creating the Commission on Job Discrimination as an amendment to a 1954 ordinance (No. 5531) creating a Commission on Human Rights. The Commission on Job Discrimination is given authority to investigate and recommend disposal of complaints of discrimination in employment based on race, creed, color or ancestry.

AN ORDINANCE to amend the Municipal Code of the City of Des Moines, Iowa, 1954, by adding to Chapter 2 thereof new sections to be known as ARTICLE XIV, Sections 2-429 to 2-439, inclusive, establishing a Commission on Job Discrimination, providing for the appointment of its members and defining its duties and functions; prohibiting discriminatory practices in employment based upon race, religious creed, color, national origin or ancestry and providing penalties for the violation thereof.

WHEREAS, the State of Iowa, through Article I, Section 1 of its Constitution, proclaims that all persons are by nature free and equal; NOW, THEREFORE,

Be It Ordained by the City Council of the City of Des Moines, Iowa:

Section 1. That the Municipal Code of the City of Des Moines, Iowa, 1954, adopted by Ordinance No. 5632, October 10, 1955, be and is hereby amended by adding to Chapter 2

thereof new sections to be known as Sections 2-429 to 2-439, inclusive, as follows:

#### ARTICLE XIV. COMMISSION ON JOB DISCRIMINATION

##### Sec. 2-429. Definitions.

Whenever the word "commission" appears in this article, it shall be construed to mean the Des Moines Commission on Job Discrimination.

The words "discriminate", "discrimination" or "discriminatory" mean discrimination on the ground or because of race, religious creed, color, national origin or ancestry.

The word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers and the City and any of its departments, divisions, boards, commissions, officials, agents and employees.

The word "employee" does not include an individual employed by his parents, spouse or child or in the domestic service of any person.

The word "employer" does not include a club exclusively social, or a fraternal, charitable, educational or religious association or corporation if such club, association or corporation is not organized for private profit, nor does it include any person with fewer than three employees.

The word "labor organization" means any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employees concerning grievances, terms or conditions of employment, or of mutual aid or protection in connection with employment.

The word "employment agency" means any person who undertakes with or without compensation to procure opportunities to work, or to procure, recruit, refer or place employees.

#### **Sec. 2-430. Unlawful Employment Practices.**

It shall be an unlawful employment practice:

(a) For an employer, because of the race, religious creed, color, national origin or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For a labor organization, because of the race, religious creed, color, national origin or ancestry of any individual to exclude from full membership rights or to expel from its membership such individuals or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religious creed, color, national origin or ancestry.

(d) For any employer or employment agency to discriminate in classifying, procuring, recruiting, referring or placing individuals for employment.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, test-

tified or assisted in any proceeding under this article.

(f) For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

#### **Sec. 2-431. City Contracts.**

The City of Des Moines and all of its contracting departments, divisions, boards, commissions, officials, agents and employees shall include in all public works contracts hereafter negotiated a provision obligating the public works contractor not to commit any of the unlawful employment practices set forth in Section 2-430, with the exception of subparagraph b, and shall require such contractor to include a similar provision in all sub-contracts.

#### **Sec. 2-432. Establishment: Appointment: Composition: Terms.**

There is hereby established in the city government, a commission to be known as the Des Moines Commission on Job Discrimination, which commission shall consist of five members. Members of such commission shall be appointed by the city council. Of the five members first appointed, two shall be appointed for three years, two for two years and one for one year. Each member shall serve for his respective term and until his successor has been appointed and has assumed office. Thereafter all appointments shall be for three years. Any three members shall constitute a quorum.

#### **Sec. 2-433. Officers.**

The commission shall elect a chairman and secretary. Such officers shall serve for a term of one year, or until their successors shall be appointed and qualified.

#### **Sec. 2-434. Compensation.**

All members of the commission shall serve without compensation, but shall be reimbursed for all expenses necessarily incurred.

#### **Sec. 2-435. Additional Personnel.**

The commission shall appoint such personnel, at such compensation as may from time to time be authorized by the city council, and may delegate to such personnel such duties as it deems proper.

**Sec. 2-436. Duties Generally.**

It shall be the duty of the commission to:

- (a) Initiate or receive and investigate complaints charging unlawful employment practices.
- (b) Seek conciliation of complaints, hold hearings, make findings of fact, issue recommendations and publish its findings of fact, and recommendations in accordance with the provisions of this article.
- (c) Confer and cooperate with and furnish technical assistance to employers, labor organizations, employment agencies and other public and private agencies in formulating programs for elimination of job discrimination. The commission may stimulate the establishment of committees in industry, labor and other areas, and make specific and detailed recommendations to the interested parties as to the methods of eliminating job discriminations.
- (d) From time to time, but not less than once a year, render to the city council a written report of its activities and recommendations.
- (e) Formulate and carry out a comprehensive educational program designed to prevent and eliminate discrimination because of race, color, religion, ancestry, national origin or place of birth.
- (f) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this article.

**Sec. 2-437. Complaints: Investigations: Hearings.**

(a) A complaint charging that any person has engaged or is engaging in any unlawful employment practice may be made by the commission itself, by an aggrieved individual, or by an organization which has as one of its purposes the combating of discrimination or the promotion of equal employment opportunities. A complaint must be filed with the commission within sixty days after the alleged unlawful employment practice.

(b) The commission shall make a prompt and full investigation of each complaint of an unlawful employment practice.

(c) If the commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful employment practice charged in the complaint by means of conciliation and persuasion. The commission shall not make public the details of any conciliation pro-

ceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted without identification of the parties.

(d) In case of failure to eliminate the unlawful employment practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to determine whether or not an unlawful employment practice has been committed. The commission shall serve upon the person charged with having engaged in the unlawful employment practice, hereinafter referred to as the respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten days after the service of the statement of charges. The respondent shall have the right to file an answer to the statement of charges, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses and to present evidence in his own behalf.

(e) If upon all the evidence presented the commission finds that the person charged in the complaint has not engaged or is not engaging in any unlawful employment practice, it shall state its findings of fact and dismiss the complaint. If upon all the evidence presented the commission finds that the respondent has engaged or is engaging in an unlawful employment practice, it shall state its findings of fact and shall issue such recommendations as the facts warrant.

(f) In the event the respondent fails to comply with any recommendation issued by the commission, the commission shall certify the case and the entire record of its proceedings to the city solicitor for appropriate action to secure enforcement of the commission's order.

(g) Whenever the City of Des Moines, or any of its departments, divisions, boards, commissions, officials, agents or employees has engaged in or is engaging in any unlawful employment practice, in violation of any provision of this article, the commission, on its own initiative, may make investigation and hold a hearing, as above provided, and shall report any such violation to the city manager for appropriate action.

**Sec. 2-438. Penalty.**

A violation of any of the provisions of this article, or any order of the commission issued pursuant to Section 2-437, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding thirty days.

**Sec. 2-439. Authority for Article.**

This article shall be deemed an exercise of the police power of the city under Sections 366.1 and 368.1, Code of Iowa, 1954, for the protection of the public welfare and the health, peace and good order of the inhabitants thereof.

Sec. 2. The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof shall be held illegal, invalid or unconstitutional or inapplicable to any person or circumstance such illegality, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or parts of the ordinance

or their application to other persons or circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

Sec. 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Sec. 4. This ordinance shall be in full force and effect from and after its passage and publication as provided by law.

**CONSTITUTIONAL LAW****Interposition and Nullification—Tennessee**

**House Resolution No. 1** of the 1957 regular session of the Tennessee General Assembly, adopted January 17, 1957, protests the decision of the United States Supreme Court in the *School Segregation Cases* and resolves to resist any "illegal encroachments upon the powers reserved to the State of Tennessee." A similar resolution (S. Res. No. 3) has been introduced in the Senate. That resolution follows:

**HOUSE RESOLUTION NO. 1**

WHEREAS, the Federal Government possesses no powers except those which were delegated by the respective states in the Constitution of the United States, and the Federal Government and all its branches and agencies, including the judicial branch, is therefore a government of limited powers. All powers not delegated to the Federal Government by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states or to the people; and

WHEREAS, neither the original Constitution nor the Fourteenth Amendment mentions public education. The operation of public schools has been traditionally the province of the states, and the contemporaneous documents and debates concerning the Fourteenth Amendment plainly show that the Fourteenth Amendment was never intended to affect the system of public education maintained and operated by the respective states, nor to forbid the teaching and training of pupils of the white and negro races in segregated schools; and

WHEREAS, the same Congress which proposed the Fourteenth Amendment established segregated schools in the District of Columbia; and

WHEREAS, in many instances, the same State Legislatures that ratified the Fourteenth Amendment also provided for systems of segregated public schools; and

WHEREAS, the State of Tennessee did not agree, in ratifying the Fourteenth Amendment, nor did the other states ratifying the Fourteenth Amendment agree, that the power to operate racially segregated schools was to be prohibited to the states thereby; to the contrary, of the thirty-seven states in the Union in 1868, at the time of the adoption of the Fourteenth Amendment, twenty-six states had segregated schools already in existence or thereafter established segregated schools; and

WHEREAS, the doctrine of separate but equal schools originated in the City of Boston in 1820 and was approved by the Supreme Court of Massachusetts in the case of *Roberts vs.*

*Boston*, 59 Mass. 198, decided in 1849. It was followed not only in Massachusetts, but in Connecticut, New York, Illinois, Indiana, Michigan, Minnesota, New Jersey, Ohio and Pennsylvania and other northern states, and was already recognized and approved by the executive, legislative and judicial branches of the governments of many states at the time of the adoption of the Fourteenth Amendment in 1868; and

WHEREAS, in the case of *Plessy vs. Ferguson*, 163 U. S. 537, 16S. Ct. 1138, 41 L.Ed. 256, the Supreme Court of the United States expressly declared that under the Fourteenth Amendment no person was denied any rights if the states provided separate but equal public facilities. This case has been cited and approved in many cases. In 1927 Chief Justice William Howard Taft, a former president of the United States, announced a unanimous opinion in *Gong Lum vs. Rice*, 275 U. S. 78, 48 S. Ct. 191, 72 L.Ed. 172, declaring that the "separate but equal" principle is "within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment"; and

WHEREAS, the State of Tennessee and its political subdivisions have established a public school system providing separate facilities for students of the white and negro races and vast sums of public revenues have been expended in an effort to provide separate but equal facilities for students of the white and negro races. Both the Constitution and the public statutes of Tennessee require segregation of the races in public schools; and

WHEREAS, the Tennessee Agricultural and Industrial State University for negroes at Nashville is a recognized and accredited institution of higher learning, offering both under graduate and post graduate training, and in both physical plant and curriculum compares favorably with, and in some instances excels, the University of Tennessee and the other State colleges; and

WHEREAS, the State salary schedule for teachers makes no distinction whatever between white and negro teachers, and State school funds are distributed upon exactly the same basis for negro teachers and pupils as for white teachers and pupils; and

WHEREAS, the system of "separate but equal" schools has worked advantageously for

both the negro race and white race. Marked progress has been accomplished in the education of pupils of both races; and

WHEREAS, the Constitution of the United States cannot be amended except by following the amendatory procedure therein prescribed, and there has been no constitutional amendment changing the "separate but equal" concept recognizing the power of the state to maintain segregated schools; and

WHEREAS, in 1954, the case of *Brown vs. Board of Education*, 347 U. S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R. 1180, the Supreme Court of the United States overturned decades of precedents and held that compulsory segregation of the races in the public schools deprives negro pupils of the equal protection of the laws guaranteed by the Fourteenth Amendment; and

WHEREAS, this opinion of the Supreme Court threatens to result in a deterioration of the good relations that have been cultivated and developed between citizens of the white and negro races in Tennessee. The integration of the high school at Clinton, Tennessee has brought about problems that have harassed and hampered students of both the white and negro races in said school and has greatly interferred with the orderly training and education of students in said school; and

WHEREAS, having seen the disastrous consequences that the desegregation of public schools at Clinton, Tennessee, in the District of Columbia and elsewhere has brought to both white and negro students, public school officials of Tennessee are apprehensive that compliance with the Supreme Court opinion would result in severe damage to the public school system of this State and undermine the great progress that has been accomplished in public education in Tennessee through the years.

#### NOW, THEREFORE,

1. Be it resolved by the House of Representatives of the General Assembly of the State of Tennessee, That the decision of the Supreme Court of the United States in the school segregation cases is deplored and denounced as:

- (1) An abuse of judicial power;
- (2) The exercise of legislative functions by the judicial branch of government;

- (3) The amending of the Constitution of the United States by Judicial fiat; and
- (4) The exercise of powers by the judicial branch of the Federal Government which was reserved to the several states.

2. *Be it further resolved*, That the House of Representatives, in cooperation with the Senate, expresses its firm resolution to maintain and defend the Constitution of the United States and the Constitution of the State of Tennessee against every attempt, whether foreign or domestic, to weaken and destroy the structure of the State and Federal Government.

3. *Be it further resolved*, That the House of Representatives, in cooperation with the Senate, pledges the support to the proposed amendment to the Constitution of the United States to insert a provision substantially as follows;

"The legislative, executive and judicial powers of the United States as granted under the Constitution shall not be construed to

extend to the regulation of the public schools of any State nor to include a prohibition to any State, in the exercise of its power, to provide by its laws for the establishment, operation and maintenance of racially separate but substantially equal public schools within each state."

4. *Be it further resolved*, That the House of Representatives, in cooperation with the Senate, pledges its firm intention to take all appropriate measures, honorably and legally available, to resist any and all illegal encroachments upon the powers reserved to the State of Tennessee in order to control its own domestic institutions according to its own exclusive judgment.

5. *Be it further resolved*, That the House of Representatives, by the adoption of this resolution, urges upon the separate states and the people thereof their prompt and deliberate efforts to prohibit further encroachments by the Federal Government upon the powers reserved to the separate states and the people thereof.

# ADMINISTRATIVE AGENCIES

## EDUCATION

### Public Schools—District of Columbia

See the report of the Superintendent of Schools of the District of Columbia to the District Board of Education concerning matters arising upon the elimination of race distinctions in admission policies in the District schools, at p. 210.

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## EDUCATION

### Public Schools—New York

Following the initial decision of the United States Supreme Court in the *School Segregation Cases* the Board of Education of the City of New York adopted a resolution calling for the appointment of a Commission on Integration to study and report factors affecting the attainment of an announced goal of "racially integrated schools." A prime consideration of the Board was the abolition of "de facto" segregation arising from racial residential patterns. Within the Commission subcommissions on (1) Zoning, (2) Educational Standards and Curriculum, (3) Guidance, Educational Stimulation and Placement, (4) Teacher Assignment and Personnel, (5) Community Relations and Information, (6) Physical Plant and Maintenance, and (7) Liaison were appointed. Reports of some of these subcommissions have been made and adopted by the Board. The report of the subcommission on Zoning, approved by the full commission on December 14, 1956 (reproduced below) recommends in general the establishment and reestablishment of school zones so as to promote a maximum of racial integration in all schools. It is reported that publication of all the reports of the subcommissions will be made by the Board when they are adopted.

#### REPORT OF THE SUB-COMMISSION ON ZONING GENERAL COMMENT

The sub-commission on Zoning of the Board of Education's Commission on Integration has given careful and considered attention to the conditions that exist in New York City that tend to separate children of different ethnic origins and proposes a plan to achieve more racially balanced schools.

New York City's public elementary and junior high schools are neighborhood schools and the school populations, therefore, reflect the ethnic composition of the school district. This means that children within a given composition of the

community area determined by school officials attend the school in that area. This is the basic cause for the condition whereby many of our schools have homogeneous populations, commonly called de facto segregation.

The Supreme Court decision of May, 1954 had the effect of declaring unconstitutional those state or local laws which mandate school segregation. In this sense it has no application in New York City since the State of New York has for many years prohibited by law such school segregation. In writing its decision, the Supreme Court established the premise upon which it based that decision:

"We come then to the question presented:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

"... To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone..."

This conclusion would appear valid no matter how the segregation comes about, if it is solely on basis of race.

Although the law governing New York City public institutions forbids all forms of discrimination, there are factors that tend to perpetuate homogeneous schools and to impede efforts toward integration in our schools. Such factors include our housing pattern, our long tradition of the concept of the neighborhood school, community attitudes, misinformation, zoning criteria which did not emphasize more racially balanced schools, pressures on school officials to violate district boundaries and falsifications of address by parents to prevent their children from attending schools with Negro and Puerto Rican children.

Taking all of the above facts into consideration, the subcommission on Zoning made its study with the awareness that zoning is one of the key points in the efforts of the Board of Education "... to devise and put into operation a plan which will prevent the further development of such schools (racially homogeneous) and would integrate the existing ones as quickly as practicable."<sup>[1]</sup>

The sub-commission's first task was to examine present major zoning criteria which are the determinants of zone lines: distance from home to school, maximum utilization of school space, transportation, topographical barriers and continuity of instruction.

The Board of Education, in affirming the spirit of the Supreme Court decision, stated "... that racially homogeneous public schools are educationally undesirable."<sup>[2]</sup> In the light of this, it is clearly necessary to re-evaluate the

neighborhood-school concept and the major zoning criteria which, in addition to integration, are the determinants of zone lines. These are:

1. Distance from home to school—This means that the proximity of the school to the homes of the children who attend it is a major consideration in deciding on the boundary lines. This is particularly true of the elementary schools. A half-mile is considered beyond walking distance for pupils in the kindergarten through second grade, a mile for pupils in the third through the eighth grade.
2. Maximum utilization of school space—in the face of mounting enrollments, it is necessary to adjust zone lines to make the most efficient use of existing school facilities.
3. Transportation—Where it is necessary for children to use public transportation, the convenience and accessibility of such transportation has been a factor in setting zone lines. In instances where children are assigned to schools beyond the distance limits mentioned in Item 1, transportation by various means, including special bus, is provided.
4. Topographical barriers—Lakes, rivers, canals, railroads, street crossings, bridges, parks, highways and other natural and man-made obstacles are factors which often have an intruding influence with respect of school zoning.
5. Continuity of instruction—It is an objective to avoid shifting the same pupils several times because of adjustments in school boundaries.

The clear and positive integration policy, as stated by the Board of Education, means that all of the existing zoning criteria must now be reviewed at the highest level in the light of their effect on school integration.

The local Assistant Superintendent is the school official to whom is assigned the task of determining the boundary lines for the elementary schools and the feeder pattern for the junior high schools in his districts. It is Board of Education policy that the local Assistant Superintendent consult with parent groups before establishing the zone lines in his districts.

In its examination, the sub-commission on Zoning found the need for a clear, positive zon-

[1., 2.] Quotation from policy statement of the Board of Education—December, 1954.

ing policy to promote racially balanced schools.

The formulation of a comprehensive zoning plan (explained in Recommendation II) incorporating the philosophies, policies and procedures to accomplish integration to the extent possible in the city schools; securing necessary information on residential patterns, population trends, etc.; the evaluation of future zoning practices as they affect integration; are functions in part beyond the scope of a local Assistant Superintendent.

There may be instances where integration can be achieved, while the usual consideration is given to the zoning factors mentioned above. In other cases, it may be necessary to modify the application of these criteria in order to attain maximum integration. The advantages to the children to be gained from the consideration of these criteria must be weighed against the advantages to be gained from education in integrated classrooms.

Since these factors have very little effect on students of senior high school age, it would seem possible to obtain a reasonable racial balance in the larger number of academic and vocational high schools in our system. Suggestions for methods to change the percentages of the various racial groups entering high school are beyond the purview of this sub-commission. However, efforts should be made to distribute this total population so as to have each such high school population reasonably reflect the ethnic make-up of the over-all high school population and so as to avoid having any such high school composed solely of one ethnic group. Specialized high schools present other complications since special examinations are used as part of the basis for admission. Present admission requirements should be studied with a view to determining a method to identify potentially able students who have been environmentally disadvantaged.<sup>[3]</sup> The pilot project in identification, guidance and stimulation of students now being conducted at Junior High School 43, Manhattan, as the result of a recommendation of the sub-commission on Guidance, may provide valuable information for this purpose.

At the junior high school level, the aforementioned zoning criteria must be taken into consideration to a greater extent than the high

[3.] In the integration of high schools, a study should be made of the program adjustments that may be necessary for integration.

schools. However, there is considerably more flexibility than in the case of elementary schools. By a careful selection of feeder schools and/or establishment of zone lines, it is possible to improve the racial balance in junior high schools, both in fringe areas and those not too remote from fringe areas.

At the elementary school level, the boundary lines of schools located in or sufficiently close to fringe areas can be drawn to achieve reasonable balance. However, for schools where this method is not possible, there are other methods such as the following which have been brought to the attention of the sub-commission. These are listed with the understanding that the circumstances for each particular school must be carefully examined to determine which, if any, of these methods can be applied successfully in the furtherance of integration. Care must also be exercised that none of these methods is used to the detriment of integration.

1. Permissive zoning (that is, permission to attend a school other than that to which a child is assigned) can be used to provide children in a school with homogeneous population the opportunity to attend an integrated school.
2. Selective use of bus transportation (for example, where an under-utilized school is within a reasonable distance by bus of a school with a homogeneous population, children may be transferred from the latter school to the under-utilized one).
3. Change of organization of school (such as converting junior high to elementary school)—This method can be used to help reduce the number of years a child spends in a homogeneous setting.

Every effort must be exercised to maintain high educational standards in integrated schools to stimulate students and parents and school staff. Recommendations in this regard of the sub-commission on Educational Standards and that on Physical Plant and Maintenance are noted.

From these methods and others which may be devised by the professional staff, the local Assistant Superintendent and the Central Zoning Unit proposed in our recommendations may select those which can be applied in each instance.

The above examination of the problem at the

various school levels and the formal recommendations which follow are designed to help the Board of Education mitigate the effects of the segregated residence pattern, a condition which affects the public schools but with which the Board cannot deal directly.

However, it must be remembered that this pattern is caused in part by attitudes of prejudice, indifference and misunderstanding which must be corrected eventually if integration is to be complete. Education in a democratic setting has meaning as preparation for living in a democratic setting. The steps taken in the zoning program must be accompanied by a community relations program that engenders support for integration on the part of parents of all groups. Although valuable time and effort should not be expended counteracting evasive actions of confused, insecure or misguided parents, they must be helped to understand the change which is taking place in their communities and the constructive ways in which to meet this change. Intelligent guidance can ease their rigidity and provide them with greater security. This places a serious responsibility on the agencies that will be charged with the implementation of the zoning program. They must, by the exercise of good judgment, choose the path that assures constant progress and thus final success in achieving the Board of Education objectives.

In order to further the objectives of the Board of Education to establish integrated schools to the extent possible, the sub-commission on Zoning recommends:

I That the Board of Education establish the objective of racial integration as a cardinal principle of zoning. In so doing, all members of the professional staff who do now, or will in the future, have any part in the assignment of children to, or the location of regular schools, special schools and special classes, must be made conscious of this principle. They must seize each opportunity to implement it.

II That a comprehensive plan be formulated by the Superintendent of Schools and, in general, be administered by a Central Zoning Unit. The comprehensive zoning plan should:

1. Provide guide posts for the As-

sistant Superintendent to help him determine the proper weight to be given to the principle of securing racially balanced schools as well as other principles of zoning, mentioned heretofore, as he prepares zoning proposals for the schools of his districts for submission to the Central Zoning Unit.

2. Devise a set of criteria by which the Central Zoning Unit can determine the extent to which each local zoning plan fits into the comprehensive plan.
3. Establish priorities for groups of schools and provide a timetable for the accomplishment of integration in the schools.
4. Describe procedures which the Central Zoning Unit and the Assistant Superintendent can use in reaching objectives such as redrawing boundary lines, placement of special classes and courses, selective use of bus transportation, re-arrangement of feeder patterns and permissive zoning to promote integration only. The comprehensive plan should be presented by the Superintendent of Schools to the Board of Education in sufficient time to permit the plan to be put into operation in September, 1957.

III That an Advisory Council on Zoning be organized on a city-wide basis, composed of representatives of city departments and agencies such as the City Planning Commission, Housing Authority, Traffic Department, Commission on Intergroup Relations, etc., for the following purposes:

1. Provide for the mutual interchange of information to assist in composing racially balanced schools and communities.
2. Coordinate present plans of these departments and agencies to assist in composing racially balanced schools and communities.
3. Develop comprehensive, long-term plans for the purpose of furthering the establishment of more

racially balanced schools and communities.

4. Provide for the participation of interested civic groups in devising plans for racially balanced schools and communities. (This may be on a formal basis by way of a committee of representatives of these groups or other means deemed most feasible.)
5. Provide advice and information to all member departments and agencies for the purpose of furthering the establishment of more racially balanced schools and communities.

It is further recommended that, upon agreement by the Board that such a council be organized and that the Board of Education be a member of this council, the Liaison sub-committee of the Commission on Integration be requested to suggest more specifically the composition and functions of such a council.

**IV** That a Central Zoning Unit be established by the Superintendent of Schools for the purpose of preparing and coordinating city-wide zoning plans in order to achieve maximum integration in the public schools. This unit would perform the following functions:

1. Compare the zoning proposals of each Assistant Superintendent before the beginning of each school year with the comprehensive plan for zoning and consult with the Assistant Superintendent concerning such changes as are indicated. The Central Zoning Unit will then prepare for the Superintendent of Schools the zoning plans for the districts.
2. Evaluate the efficiency of the comprehensive plan in securing more racially balanced schools and recommend to the Superintendent of Schools for presentation to the Board of Education changes to make the comprehensive plan more effective.
3. Report periodically to the Superintendent of Schools so that he may advise the Board of Education on the effectiveness of zoning policies and procedures and recommend changes for improvement.
4. Hear appeals from the parent and community groups on zoning proposals and zoning changes by an Assistant Superintendent and make recommendations to the Superintendent of Schools for his guidance in making decisions on appeals.
5. Provide a means whereby civic groups may present their suggestions regarding over-all zoning plans.
6. Establish and maintain comprehensive city-wide zoning maps showing the following: school district boundaries and patterns of feeder schools, the racial and ethnic composition of the school population (a sufficiently good estimate of this can be obtained without recourse to direct questioning of children or parents), school utilization, site selection and planned districting for new schools, topographical characteristics and planned capital improvements having an impact on school utilization. This unit would maintain records of the composition of the school population by age and residence.
7. Devise administrative procedures to assist Assistant Superintendents and principals in combatting falsifications of address and other evasions of the proper school zones.
8. Provide for the use of the Advisory Council the information necessary to its deliberations in regard to school matters.
9. Provide information to the Assistant Superintendent to aid him in the formulation of his zoning proposals.
10. Coordinate zoning plans with the unit charged with the responsibility of making site recommendations.

**V** That the following zoning duties be assigned by the Superintendent of Schools to the Assistant Superintendents:

1. Each Assistant Superintendent,

after consultation with parent and community groups, and with the advice of the Central Zoning Unit, will prepare zoning proposals for the schools in his districts for the following year. These proposals will be prepared in accordance with the comprehensive plan for integration and submitted to the Central Zoning Unit at the time specified by that Unit.

2. During the school year, changes in the adopted zoning plan are to be made by the Assistant Superintendent if, in his judgment, a change in the determinants of his plan warrants such adjustment, and if, in his judgment, the changes do not conflict with the comprehensive plan or the program of integration and require no consideration by the Central Zoning Unit. However, any such change should be reported immediately to the Central Zoning Unit for incorporation in its records and on its maps.
3. The Assistant Superintendent should make public, within his districts, his proposals on zoning and invite constructive comment and suggestions by parent and community groups involved in the changes.
4. The Assistant Superintendent should take appropriate steps to develop within his districts an understanding of and positive attitudes toward more racially balanced schools as part of a good intergroup relations program.
5. The Assistant Superintendent should present to the Superintendent of Schools through the Central Zoning Unit suggestions for more effective action through zoning to achieve more racially balanced schools.

**VI** That a broad community relations program be developed. Such a program would be in addition to the efforts of each Assistant Superintendent in this regard. It should be designed to obtain the active assistance of the community

in securing and maintaining heterogeneous school populations. This is crucial if this program of integration in the schools is to take full effect in other areas of community life. We invite the attention of the Community Relations sub-commission to this item.

Some of these recommendations may require additional budget funds; however, there are many recommendations which can be implemented without extra funds. This sub-commission believes that the objectives to be gained definitely justify the expenditure required.

#### *Specific Problems*

The sub-commission invited three community groups who had expressed grievances with regard to zoning. It heard these protests in the belief that this action would be helpful in developing a set of zoning principles and a machinery for implementing them. In conducting these hearings, the sub-commission did not assume that it had administrative jurisdictions or that its function included adjudication of individual complaints. This conclusion was supported by the Executive Committee of the Commission and by the Commission itself. At that time, the opinion was expressed that no sub-commission should be involved in the operations and techniques that rightfully belong to the professional staff. The summary of these hearings is appended at the end of this report.

#### *Appendix*

**Hearing No. 1:** Presentation by the Brooklyn Branch NAACP: Junior High School 258 is a new school in Brooklyn that is an all Negro school. Near it, under construction, is J.H.S. 61, Brooklyn, which the Board of Education promises will be an integrated school. The plaintiff charges that "a serious error of judgment was made in the location of J.H.S. 258" and asks that J.H.S. 258 be re-organized to make it an integrated school.

**Hearing No. 2:** Presentation by the Parents' Association of Public School 93, Manhattan: The plaintiff was concerned over the population trend which is in the direction of more Negro and Puerto Rican children in P.S. 93 than in P.S. 75 and P.S. 166, Manhattan, neighboring schools. It was suggested that integration could

be furthered by transferring the I.G.C. classes in P.S. 75 to P.S. 93 and by making the school more attractive physically.<sup>[4]</sup>

**Hearing No. 3:** Presentation by the Forest Houses Neighborhood Committee: Two high

[4.] Reference is made to recommendation 2 of the Report of the sub-commission on Educational Standards and Curriculum for whatever bearing that recommendation may have on this particular situation.

schools in The Bronx, Grace Dodge Vocational H.S. and Jane Addams Vocational H.S., offer courses in Beauty Culture. Jane Addams' courses are predominantly filled with Negroes. Grace Dodge's courses are taken mostly by whites. It was suggested that all beauty culture courses be given at Jane Addams and that all Bronx students desiring such courses be restricted to the Bronx school.

## EDUCATION Public Schools—Tennessee

(See the resolution adopted by the Anderson County, Tennessee, School Board seeking federal enforcement of the decree of a federal district court requiring integration of the Clinton High School, p. 27).

## EMPLOYMENT Fair Employment Laws—New Jersey

**Benjamin A. THOMPSON and Edward Williams v. ERIE RAILROAD COMPANY.**

Department of Education, Division Against Discrimination, New Jersey, June 15, 1956, Case Nos. 9-BR-703, 4.

**SUMMARY:** Two Negro dining car waiters-in-charge brought a complaint<sup>a</sup> in 1951 against the Erie Railroad Company before the New Jersey Department of Education, Division Against Discrimination. The two complainants stated that they had been denied advancement to the position of steward by the railroad through a consistent company policy of failure to upgrade qualified Negro waiters-in-charge to steward because of their race. After lengthy investigation and hearings the Department found the alleged racial discrimination to be established and issued a blanket order to the railroad to cease and desist from discrimination in its employment and promotion policies.

### STATEMENT OF THE CASE

On August 13, 1951, two complaints were filed against the Erie Railroad Company charging that two waiters-in-charge were discriminated against because of the failure of the

a. The complaint was brought under the New Jersey "Law Against Discrimination" (New Jersey Statutes Annotated, Title 18, Chap. 25). That statute provides in part that

"It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: . . .<sup>a</sup> For an employer, because of the race, creed, color, national origin or ancestry, of any individual, or because of the liability for service in the armed forces of the United States, of any individual, to

Railroad to upgrade them to the position of steward. The complainants were Edward Williams, 63 Claremont Avenue, Jersey City, New Jersey, and Benjamin A. Thompson, 3503-108th Street, Corona, Long Island. The respondent's office is at 721 Jersey Avenue, Jersey City, New Jersey. The allegations of discrimination in the

refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces.

"\* \* \*" [N.J.S.A., Tit. 18, § 25-12]

two complaints are substantially the same except that the applications of the complainants were made on different dates. Williams applied for the position of steward on May 19, 1949, and on May 20, he received a reply from J. M. Collins, Superintendent of the Dining Car Department, acknowledging his application and stating it would be kept on file. Thompson's application was filed September 21, 1950. He received an acknowledgment from Collins saying that his application would be kept on file.

Both Williams and Thompson alleged that on or about June 26, 1951, the Erie Railroad hired a steward, whose name is Wirtz. The complainants alleged that Wirtz had employment with the railroad previously which was of a sporadic nature. Complainants further alleged that the action of putting Wirtz into the position of steward was due to a consistent policy of failing to upgrade qualified waiters-in-charge to the position of steward mainly because of their race.

#### [Investigation Conducted]

Following receipt of these complaints, an investigation was begun as required by law (18:25-14). William W. Barnes, Field Representative of the Division, made his first contact with the Erie Railroad Company on September 19, 1951 (96)\*, and subsequently on September 26, 1951, he met G. C. White, Assistant Vice President.

#### [Conciliation Attempts]

At that time, he made complete explanation as to the complaints and charges that had been brought against the Erie Railroad. At a subsequent date, November 7, 1951, the charges embodied in the complaint were discussed with White again and with J. P. Canney, Counsel for the railroad (114).

The investigation proceeded to its conclusion. Officials of the Division determined that there was reason to credit the allegations of discrimination. The period of conciliation was entered upon pursuant to the Law Against Discrimination (18:25-15). Conciliation attempts were ineffective and it became necessary in the judgment of the Commissioner to call a public hearing.

\* Numbers refer to pages of the transcript of the hearing.

Notice of hearing was sent to complainants and respondents dated June 6, 1955.

Accompanying the notice of hearing was an amended complaint. The amended complaint was prepared by the Deputy Attorney General representing the Division pursuant to the Anti-Discrimination Law (18:25-25). The amended complaint combined the statements in the original complaints of Williams and Thompson into one complaint. The respondent filed an answer admitting many allegations of the amended complaint but denying any discrimination and pleading the statute of limitations.

#### [Hearings]

On June 28, 1955, the hearing was called into session, the parties and their respective counsel being present. Complainants were present in person. The case for the complainants was presented by Thomas P. Cook, Deputy Attorney General, together with Ernest Fleischman, who was granted permission by the Commissioner pursuant to the provisions of the Law (18:25-16), to intervene and present testimony on behalf of complainants. Respondents were represented by counsel in the persons of Charles W. Broadhurst and James P. Canney.

At the outset, J. P. Canney, counsel for the respondent, objected to the proceedings on the ground that complaints had not been properly served or filed. It was subsequently agreed by counsel for both parties that the hearing would proceed on the basis of the record of June 28, 1955, and that after adjournment, the hearing would not continue for at least 20 days. Meantime, the respondent would be served with the original complaint following proper procedures. A stipulation was agreed upon that upon reconvening of the hearing at the next date set, the record of June 28, 1955, would then be made part and parcel of the record of hearing with all of the objections and exceptions included as having been made June 28, 1955, except the objection to the failure to serve the original complaint which would by that time have been properly served (67). A second stipulation was agreed to by counsel for both parties that until such time as there should be a finding of discrimination, no evidence would be taken concerning monetary damage to complainants (68).

Pursuant to stipulation, respondent was served with a copy of the original complaints. Respondent filed an answer to those complaints, deny-

ing the discrimination complained of and pleading that the complaint was not served on it within a reasonable time, and that it was barred by the 90-day statute of limitations.

Hearings proceeded through June 28, September 7 and 8, and October 26 and 27, of 1955. Five hundred eighty-five pages of testimony were taken, and 38 exhibits were received on behalf of complainants and 42 on behalf of respondents. After the hearings were concluded, briefs were received from counsel for both parties, and at the request of the Commissioner, the Attorney General submitted an opinion concerning certain points of law raised in respondent's brief.

#### THE FACTUAL ISSUE

The complaints, as amended, alleged and the answers admitted that Thompson was appointed a waiter-in-charge January 1, 1946; that Williams was appointed a waiter-in-charge on May 22, 1946; that each of these complainants served in that capacity until approximately May 13, 1947, at which time the waiter-in-charge classification was abolished by the respondent; that previous to May 13, 1947, 13 waiters-in-charge were employed, two of whom were white and 11, including complainants, were Negro; that on or about May 13, 1947, the position of steward was reestablished; that other persons were employed all of whom are white and had not been employed as waiters-in-charge to fill positions as stewards; that Williams applied May 19, 1949 and Thompson applied for the position of steward September 21, 1950; that neither complainant was appointed to the position of steward; that between May 19, 1947 and December 1, 1951, there were at least four openings for the position of steward, each of which was filled by a white person; and that on or about December 1, 1951, respondent abolished the position of steward and promoted complainants and eight others to waiters-in-charge.

Answers denied that waiters-in-charge were demoted if Negro and promoted if white; that complainants were qualified to fill the position of steward; that each complainant was as least as qualified as other persons promoted to steward; that failure to promote complainants and others similarly situated is in violation of the Law Against Discrimination; that compensation paid to waiters-in-charge is substantially less than that paid stewards when the latter position

was in existence; that complainants were deprived of any compensation; that on or about December 1, 1951, two white persons who had been stewards were transferred to the position of inspector, in which position they subsequently performed in part the duties formerly assigned to stewards; and that complainants or other Negroes were deprived of equal opportunity with white persons to apply and qualify for the position of inspector in violation of the Law Against Discrimination.

The principal issue before the Commissioner is whether the fact of color of the complainants was responsible for their not being upgraded to the position of steward. In order to arrive at a decision in this matter, it is necessary to raise and to explore a number of questions as follows:

1. What were the standards of employment?
2. What difference, if any, existed in standards; that is, the qualifications, working conditions, job requirements, and wages of waiters-in-charge, as compared with stewards?
3. What actually was the difference in the performance of the complainants as compared with stewards in terms of the standards discussed above?

We proceed now to the consideration of these questions in that order.

Railroad executives responsible for employing workers in the dining car service testified that there were standards (436 and Exhibit R-45). According to the record and the exhibit, the qualifications for stewards were as follows:

1. Pass a required physical examination.
2. Must have a passing mark on a mental aptitude test.
3. Must have a pleasing personality and good appearance.
4. Must be capable of handling the traveling public as a representative of management.
5. Must have ability to supervise employees under his jurisdiction.
6. Must be reliable.
7. Good morality.

#### [Application of Standards]

It must be presumed, also, that a person in order to be considered for the position of steward would have to apply for same. J. M. Collins

testified that he had 100 applicants for the position of steward, presumably about 1945, at which time he hired 10 or 12 stewards (242). He testified further at this point that none of these were colored. It seems clear that a person could apply for the position of steward either orally or in writing. The record shows that Edward Williams, a Negro, applied in writing on May 19, 1949 (37), and that Benjamin Thompson, a Negro, applied on September 21, 1950 (110 and Exhibit C-17) for the position of steward. Both complainants had applied several years before for the position of waiter (66, 68, and 73). The record indicates that management accepted applications from the white persons subsequently appointed as waiters-in-charge or stewards and almost immediately appointed them. For example, Millstead, a white man, applied for the position of waiter-in-charge on August 20, 1946 and was appointed waiter-in-charge August 21, 1946; Matthews, a white man, applied for the position of steward on May 26, 1947 and was appointed as steward May 28, 1947; McCormick, a white man, applied for the position of steward on August 1, 1947 and was appointed as a steward on August 18, 1947. It seems clear from the record that white men who applied for the position of steward had their applications acted upon expeditiously; whereas, the applications of complainants Williams and Thompson, Negroes, although on file, received only an acknowledgment from those responsible for employment of stewards.

#### [Use of Standards]

The Commissioner must now seek to determine whether the standards set forth above (Exhibit R-45) were in fact followed by those responsible for employing stewards. On this point, it appears from all the evidence before the Commissioner, that Negro complainants, Williams and Thompson, were not considered in terms of the standards set forth for the employment of stewards. Indeed, the record would seem to indicate that they were not considered at all, although this may be denied by respondents. There seems to be no doubt that as waiters-in-charge, Williams and Thompson had received a physical examination and there is no reason to doubt that stewards were compelled to comply with this requirement as well.

The action of the employers concerning the standard of mental examination, however, is

clear. Williams and Thompson were not given any mental examination. Indeed, testimony by respondents disclosed that the procedure used in giving mental tests to applicants for the position of steward was that they would first be put to work and then later would be given the mental test (422). If they did not then meet with the standard, they would be dismissed. At this point (454), White testified that he did not know whether any person had ever been dismissed because of failing to meet the standard on the mental test. The record of service of stewards does not disclose whether any steward was ever dismissed at all, whether because of failure to meet the mental test standard or otherwise. This is according to the testimony of White (543).

#### [Intelligence Tests]

The entire business of the use of intelligence tests as a standard for employment and/or promotion is confusing. Respondents testified (426) that complainants were not given any I.Q. test, and again in respondent's brief (33), the same admission is made. White testified (426, 427) that the so called I.Q. test had to be given, but they were confidential and could not be recorded. White further testified as recorded in respondent's brief (39), that the test used was a test put out by Dr. Otis, and that the standard was 50%. It is clear from this that White's knowledge of the mental test standards to be applied was lacking.

Collins testified that he hired Cavanaugh, a white person, as steward on September 7, 1946, and that the records indicate that Cavanaugh was given an aptitude test. Collins accepted, as evidence that a test was given, the fact that he received an employment number from the employment office. The record (547, 548), however, disclosed that Thompson who was not given an I.Q. test was employed thereafter as a waiter, after having received the same type of form from the superintendent of employment as Cavanaugh received when he was hired as a steward. From the foregoing, it seems clear either that the mental test as a standard was not applied at all, or it was not applied uniformly, or it was used only in connection with those who had already been employed rather than as a means of selecting people in terms of their mental ability.

With respect to the personalities and appear-

ance of complainants as compared with stewards, the Commissioner is unable to make any judgment. Not having seen any of the stewards except Wirtz, he has no adequate basis of comparison. He will record here the judgment that Wirtz presents no better appearance than either Thompson or Williams. He can record no judgment whatever concerning the personality of Wirtz as compared with Williams or Thompson.

On the matter of demonstration of ability to handle the traveling public as a representative of management, the record bears out the contentions of complainants' counsel in his brief (9) that no white steward appointed had any previous experience or had ever worked in any supervisory capacity. On the other hand, the complainants had had considerable experience as waiters-in-charge in handling the public as representatives of management.

With regard to the standard concerning ability to supervise employees, the same statement applies as was made concerning that of handling the traveling public. The white men who served as stewards had no previous supervisory experience; whereas the Negro complainants as waiters-in-charge had considerable experience in supervising employees under their jurisdiction.

The standards of reliability and good morality bring into question the character and education of complainants as compared with white stewards. What differences, if any, existed between the complainants, who were Negroes and waiters-in-charge as compared with stewards, all of whom were white, in terms of their education standards, their character, the working conditions, and the job requirements?

#### [Character of Complainants]

As far as education is concerned, it is clear that the years of schooling of Negro complainants, Thompson and Williams, exceeded that of any white persons serving as stewards. Williams attended Howard University for at least one year. Complainant Thompson attended Hampton Institute for at least one year and took work there in a second year. On the other hand, none of the white persons serving as stewards went beyond the high school years.

Regarding the character of stewards as compared with the character of complainants, a number of observations can be made.

There is nothing in the record derogatory

concerning the characters of stewards. An examination of references of these men at the time of their employment indicates that apparently those for whom they had worked in previous connections were willing to certify that these were men of good character. There is no reason for the Commissioner to go beyond this record.

Attempts were made by respondent's counsel to derogate the character of both Thompson and Williams. It was contended that this was done only to question their credibility since they had earlier testified that they had kept their records and performed their duties correctly and adequately. At the same time, all that was read into the record concerning complainants must necessarily have a bearing on the questions of reliability and morality in terms of which the Commissioner must make judgment as far as the upgrading or refusal to upgrade complainants is concerned.

There was read into the record (226) a letter dated June 5, 1955, from Hampton Institute which states that complainant Thompson on February 18, 1929, was suspended for violating campus regulations, but that prior to this his conduct had been very satisfactory. There was read into the record (352) a letter from the railroad auditor which is a strong complaint against Thompson. This letter is dated July 25, 1955. The Commissioner notes also that the letter, inquiring concerning Thompson's conduct while in attendance at Hampton Institute, is dated June 5, 1955, four years after the complaints were filed, and the same is to be said of the letter complaining against Thompson which is dated July 25, 1955. If these are attempts to derogate his character, the Commissioner must judge them to be self-serving documents and can give little weight to them. Besides, J. M. Collins testified (311) that there was no suggestion at any point that the waiters-in-charge were dishonest or else they would not be, he said, working for the railroad. As far as complainant Thompson is concerned, therefore, the Commissioner is of the opinion that there is nothing significant in the record to indicate any serious failure on his part to meet the standards of good morality. The matter of reliability refers also to the matter of the keeping of records and will be discussed later.

With respect to the character of Williams, a great deal is said in the record which would seem to derogate him. A communication from

steward McCormick, dated September 13, 1948, states that Williams threatened him (246). This was not denied by Mr. Williams. It is clear in the record, also, that in May of 1948, Williams served a 30-day suspension for violating company rules. If the instances pertaining to his conduct in connection with this suspension are to be believed, they are serious delinquencies on the part of Williams and cannot be condoned. At a hearing held in the office of J. M. Collins, however, at which Williams had present two representatives from the union, Williams categorically denied that he had conducted himself as described (Exhibit R-4-1).

Representatives of management are not consistent in their testimony concerning the weight to be given to the matter of the alleged misconduct of Williams. White states (460) that in considering people for the reestablished position of waiter-in-charge, the management's decision would be based upon what his record had been prior to December of 1951. Counsel for respondent, Broadhurst, however, says that Williams was given a 30-day suspension but that when he had served that, it wiped out that particular complaint as far as any penalty was concerned (365). To this, White added, "...he served the suspension and that was that." It is to be recognized that under this condition, as pointed out in respondent's brief (42), any waiter-in-charge could not be dismissed without a hearing in accordance with the union agreement. It is a matter of record that respondents did not see fit to bring charges against Williams because of his alleged misconduct at that time. Respondent's brief (42) also states that when Williams was tried and given a suspension of 30 days, the service of that suspension was a mark against his record, but it did not disqualify him for bidding at a later date for a job as waiter-in-charge. It is further a matter of record that Williams did assume the position of waiter-in-charge as of December 4, 1951. The Commissioner must give weight to the fact that the management deemed him competent to serve as waiter-in-charge while, at the same time, contending that he was not competent to serve as steward.

Williams testified (183) that he served the 30-day suspension in May 1948, and that since that time, he has not been found guilty of violating any company rules. He further testified that he knew the disciplinary proceeding was pending against him at the time he was

reassigned to the position of waiter, but that he was not up on charges at that time.

The record also contains testimony which discloses that Williams signed a request for a railroad transportation pass for his wife who is, in fact, self-supporting, being a teacher in Jersey City (179). Williams, however, testified that he followed the usual procedure in requesting such passes in that he notified a girl in the office that he wanted the pass and signed a blank form (188-99). The charge here, if sustained, that Williams knowingly falsified the record would be serious. However, Williams' statement is that the usual procedure is to ask for passes; he claimed ignorance of the fact that the form stated that he was signing a statement to the effect that his wife was completely dependent upon him. The Commissioner cannot take the position that the act of Williams, or anyone else, is to be condoned in signing any statement without knowing what he is signing.

The right of the Erie Railroad Company in its dining car service to hire and fire persons subject to agreements with employees' unions or with individual employees is not questioned. Waiters and waiters-in-charge in the dining car service are subject to a union agreement (Exhibit C-21, 450, 210-213). They may not be discharged except pursuant thereto. The agreement expressly includes the right of the executives of the railroad to bring charges against waiters and waiters-in-charge. When questioned as to why Williams had been upgraded from waiter to waiter-in-charge when the railroad considered that his character was unsatisfactory, White replied that the railroad could not suspend him and disqualify him, because, presumably, the railroad did not wish to go through the process of a hearing (463). The Commissioner will not infer from this testimony that incompetence is protected by union membership.

Furthermore, there is nothing in the union agreement to prevent the assignment of a waiter-in-charge to the position of steward. The union agreement states very clearly that the management is to be the judge as to the qualifications of people who are considered for assignment to vacancies. This statement applies, presumably, to upgradings from waiters to waiters-in-charge those who are covered by the union agreement.

#### CONDITIONS OF WORK FOR WAITERS-IN-CHARGE AND STEWARDS

Differences in working conditions and per-

quisites for the job of waiter-in-charge and steward seem clear. Waiters-in-charge wore dark trousers and white jackets and these jackets were furnished by the railroad (83, 84). On the other hand, stewards wore a blue uniform and were required to pay for these uniforms (157). Waiters-in-charge wore a large badge, while stewards wore a smaller badge (84). Waiters-in-charge slept on cots in the dining car early in their employment, along with waiters, but later dormitory cars were provided (88, 84). Waiters-in-charge were covered by the union agreement; stewards were not covered by any union agreement. Waiters-in-charge supervised other waiters and in addition waited on tables; stewards did not wait on tables, but did, at times, however, supervise a greater number of waiters. Respondent's brief (18) contends that no waiter-in-charge ever served more than 16 tables at one time. The Commissioner is disposed to take this as a general figure of operation.

In summary on this point, there is no substantial difference in responsibilities as between the position of waiter-in-charge and that of steward, except that stewards are not required to have skill in waiting on tables (430). It may further be added that presumably stewards did supervise the waiters in cars which frequently seated more customers than did cars supervised by waiters-in-charge (18). It could not be determined from the record exactly what were the facts on this point, testimony of complainants' counsel and complainants' and respondent's counsel being conflicting. Williams testified that he had, from time to time, car 939 which had 24 tables, seats, and lounge chairs. Exhibits R-11, 12, 13, are blueprints of cars 2997-8-9 and show 16 seats each.

It is significant that White testified (430) that the waiter-in-charge had every responsibility and performed every duty which a steward performs, except that the waiter-in-charge supervised fewer men. However, at the same time, he waited on tables which the stewards did not do.

The Commissioner will not, at this time, consider any differential in wages as between waiters-in-charge and stewards. While it is true that a differential in wages could conceivably have to do with the perquisites of the position, nevertheless, it has been stipulated that unless there be a finding of discrimination, there will be no attempt to consider a wage differential.

#### EFFICIENCY IN RECORD KEEPING

Among other duties, waiters-in-charge were required to do the following: to receive guests, give them their check, make change, wait on tables, take care of complaints, make a breakage report, rough handling of the train, reprimand the crew when something wrong happened, and make requisition and file a complete book at the end of the trip (26). In addition, it is clear from Exhibit C-10 that waiters-in-charge and stewards as well had to take care of the sale of alcoholic beverages. This involved the necessity for a waiter-in-charge or a steward to be familiar with the state laws concerning sales taxes and liquor taxes in states through which the train traveled. It is clear, also, that a waiter-in-charge would be accountable for all meal checks issued to him. In general, it is the judgment of the Commissioner that none of the duties set forth for waiters-in-charge were any different from those set forth for stewards. The question at issue then, is whether white stewards discharged these duties with a greater degree of competency than did the Negro complainants who were waiters-in-charge.

The testimony of respondent's witnesses is conflicting concerning whether the filling out of a silverware report for each trip is a requirement. Brode (474) testified that such was a requirement. Collins (496) stated that the silverware inventory was not a requirement. Furthermore, in connection with how important this was in determining a person's competency for upgrading, Canney testified (529) that while accuracy in keeping the trip reports, time sheets, and balance sheets may have been a consideration in appointing a steward, it was not a determining factor. Collins testified also that this was not a factor in upgrading (542).

Testimony concerning the efficiency of the Negro waiters-in-charge, who are complainants, as compared with stewards, all of whom are white, is lengthy and conflicting. The Commissioner has determined that errors were made in the various types of reports required by the Negro complainants and also by the white stewards. A detailed count of the mistakes made in the trip reports of the complainant Williams and of a white steward Cavanaugh, showed that Williams made, on the average, fewer mistakes than did Cavanaugh. The Commissioner's opinion on this point is that Negro complainants in

their reports made mistakes and so did the white stewards make mistakes.

The Commissioner has considered communications from management to complainants and has endeavored to give them their proper weight. For example, note is taken of the letter from Collins to Thompson, dated February 22, 1947, advising him of the unclean condition of his car. The Commissioner notes also (278 and in Exhibit R-10) that a letter is sent from Collins to Williams regarding the inspection of his car by a trunk-line inspector. The inspector is reported to have found Williams' car very unsatisfactory. The Commissioner notes here that this letter is dated August 19, 1954. It, therefore, is entitled to considerably less weight than the letter addressed to Williams, dated December 29, 1948. The Commissioner notes also that Collins himself testified (542) that disciplinary action for record keeping was not made a part of the service record, and that the judgment of a man in terms of his record had no more bearing on the job of waiter-in-charge than it did on that of steward. The implication here may be that the record of inaccuracies adduced at the hearing and the testimony concerning inaccuracies presented at the hearing do not necessarily present a true picture of the competencies of complainants as compared with the stewards.

In this connection the Commissioner takes note, herewith, of Canney's objections at pages 31 and 32 of the record when he says that what transpired in 1947 is irrelevant. In the hearing, the Commissioner noted the objection but refused to rule on it at that time. Canney repeated that his objection was to the immateriality of the records of the white steward. The Commissioner now reiterates his explanatory statement at page 362 of the record when he said: "My point, which I think you must be able to see, is that as bad as the record of these men (that is, the complainants) may appear to be, unless it can be shown that the record of those appointed over them or in their place is better than that of these men, then the question of the color of the complainant is still matter of concern. The only way to determine the matter of color is to determine whether these men were worse or better than all of those considered for promotion to the position of steward."

#### SUMMARY

From the foregoing, the Commissioner finds

that the matter of color was the determining factor in the failure to appoint complainants, Williams and Thompson, to the position of steward following their applications for such positions.

#### CONSIDERATION OF LEGAL ARGUMENTS OF RESPONDENT

It remains now for the Commissioner to consider the legal arguments of the respondent.

First, let us consider the argument at page 43 ff. of respondent's brief to the effect that the Division Against Discrimination is without power in this case to afford any relief.

Respondent points out that the Erie Railroad Company abolished the position of steward in December 1951, and that the amended complaint was not filed, and the notice of hearing was not served upon complainant until June 1955. The respondents contend, therefore, that under the statute creating the Division Against Discrimination, there did not exist at the time of the filing of the amended complaint and the notice of hearing, any violation of the Anti-Discrimination Law. Section 18:25-6 is cited which points up the responsibility of the Division to prevent and eliminate discrimination, also Section 18:25-15 which provides that when the Commissioner has failed to eliminate the practice of discrimination, he shall cause to be issued and served a written notice together with a copy of the complaint as the same may have been amended. Respondents argue that when the position concerning which allegations have been made of discrimination has been eliminated, the practice can no longer exist.

Respondents cite the case of General Leather Products Co., Luggage and Trunk Makers Union, Local #849, 121, N.J. Eq. 101:

"It seems clear that if the illegal acts had ceased and this is admitted by the complainants or at least not denied, that an injunction should not issue because as the learned vice-chancellor said, an injunction is a preventive remedy and not a punishment for past conduct."

The Commissioner has examined this case and finds at page 102 that the Court of Errors and Appeals said:

"There is not sufficient record before us to determine whether the appellant's case is meritorious."

The implication here is, apparently, that if the

court had thought the appellant's case was meritorious, it might have ruled otherwise than as quoted above by respondents. In the case before the Commissioner, the Commissioner has determined that complainants' case is meritorious.

Furthermore, in J. I. Case Co. v. N.L.R.B., 321 U.S. 322 (1944), where an employer had refused to bargain with a union on the ground that contracts with individual employees precluded it from doing so, the fact that the individual contracts had expired, did not render the case moot on appeal to the United States Supreme Court in view of the continuing obligation imposed by the law and by the order of the National Labor Relations Board.

Likewise, in Federal Trade Commission v. Goodyear Tire and Rubber Co., 304 U.S. 257, 260 (1938), and Perma Maid Co., v. Federal Trade Commission, 121 Fed. 2nd, 282, (C.C.A.6, 1941, where cease and desist orders, issued by the Federal Trade Commission were affirmed on appeal, it was held that abandonment of unlawful trade practices, even if proved, did not render the controversy moot since there was no guarantee that the practices complained of would not be resumed. The duty of the Federal Trade Commission, as the court stated, was to prevent as well as to eliminate unlawful trade practices.

Respondent admits in his brief, at page 45, that the provision in 18:25-17 gives the Division the power in an order to cease and desist to award back pay.

Also cited by respondent is the case of Rosenthal v. Sheppard Broadcasting Service, 12, N.E., Sec. 819, where the Supreme Judicial Court of Massachusetts refused to issue an injunction. The court said:

"In these circumstances, it is plain there is no ground for the issuance of an injunction. That relief would be of no use to the petitioners and would be apparently of no value in aid to the public welfare."

The Commissioner is of the opinion that the court was saying, here, that if relief to petitioners could have been afforded, the court might well have issued an injunction.

In this same decision, the court stated that it had no reason to believe that respondents would institute again the procedure which brought about the complaint in the first instance. In the case before the Commissioner, the Commissioner cannot so rule. There remains the possibility

that the Erie Railroad Company may at some future time reestablish, as it did before under the circumstances discussed above, the position of steward. Consequently, the Commissioner believes he is in order in making a cease and desist order to prevent the company from discriminating against persons because of race, creed, color, or national origin in the event that the position of steward may be reestablished; or for that matter, he feels he may issue an order forbidding discrimination in employment and/or upgrading to any and all positions in the company.

The language of N.J.S.A., 18:25-17 provides also that:

"If . . . the Commissioner shall find that the respondent *has engaged* in any unlawful employment practice, the Commissioner . . . shall issue . . . an order requiring such respondent to cease and desist from such unlawful employment practice."

In the light of the words of the act itself, and with full consideration of the cases cited in support of this argument by learned counsel for respondents, the Commissioner is constrained to rule that this argument that the Division is without power to afford relief in this case is not sustained.

Respondent contends at pages 46 to 48 of his brief that the language of the law precludes the finding of discrimination against respondent. He cites Section 18:25-12A, and by his own admission; he comes under the mandate not to discriminate against person ". . . in compensation or in terms, conditions or privileges of employment . . ." It may be said that Thompson and Williams in their capacity as waiters-in-charge are not necessarily entitled to upgrading to the position of steward. Even if that be granted, Thompson and Williams still had a right to apply and to be considered for appointment as stewards. The Commissioner agreed with the respondent at page 47, "that there was nothing in the collective bargaining agreement (of the union) which gave them any privilege to be appointed as stewards." Even so, they were entitled under the law to consideration for appointment to the position of steward because they had applied and because of their experience in a position which has already been admitted by respondent's counsel and other officials of the railroad to be substantially equivalent in duties, responsibilities, and requirements to that of

steward. Therefore, this argument of respondent cannot be sustained.

The contention of respondent at page 47 of his brief under this argument concerning the matter of wages will not be considered at this time. When the respondents have complied with the Commissioner's order, stated hereafter, the matter of wages may then be considered.

#### [Class Actions]

Respondent argues herewith that the Anti-Discrimination Law does not authorize the Commissioner without the approval of the Commission to include class action as a part of the proceedings in investigation, conciliation, and settlement of a complaint. It is contended at page 49 of his brief that, in order for the Commissioner to include class action in the proceedings, there would have to be a rule or regulation adopted by the Commissioner with the approval of the Commission. This argument cannot be sustained even in the light of the wording of the rules and practice which have been adopted by the Commissioner with the approval of the Commission. Rule #20 of the Rules of Practice established pursuant to Section 17 of Chapters 169, P. L. 1945, and as amended and supplemented effective as of April 14, 1951, which were adopted April 4, 1951, reads as follows:

"The rules herein contained shall be considered as general rules of practice to govern, expedite, and effectuate the procedure before and the actions of the Commissioner in connection with complaints filed pursuant to statute; and except as to such parts thereof as are statutory provisions they may be relaxed or dispensed with by the Commissioner in his discretion, in any case where a strict adherence thereto may result in injustice."

It is the Commissioner's opinion that if the processing of complaints in terms of individuals only must be relied upon to end discriminatory practices in employment, a great injustice would be done to members of those groups which have been in the past discriminated against. In other words, if it should be determined that the Commissioner is without power to amend complaints so as to include all persons similarly situated whenever an individual files a complaint, then the progress of this State toward the elimination of discrimination under the law would greatly

be retarded. For these reasons, this argument is not sustained.

The Commissioner's reasoning is sustained, he believes, by Rule 4:36-1 of the Supreme Court Rules which provides in part:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is . . . (c) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

It is unthinkable that the "several rights and a common relief" would not apply to civil rights and that the Supreme Court Rule would not apply in the language of the Statute (18:25-2) ". . . in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights."

#### [Statute of Limitations]

The argument presented by respondent's counsel in his brief (48 ff.) is a learned presentation of many points of law. The gist of the argument, however, is that the statute of limitations has run. Complaints were filed August 13, 1951. They should have been filed within 90 days after any alleged act of discrimination. The alleged act of discrimination in this instance is the employment of Wirtz as a steward. The railroad contends that Wirtz was employed as a steward on October 3, 1950. The Commissioner's reasoning here is as follows: In the first place, the act of discrimination was a continuing one against both Thompson and Williams from the date on which they applied. Williams applied May 19, 1949, and Thompson applied September 21, 1950. There is nothing in the record to indicate that the railroad had any agreement with the stewards as a group or with individual stewards which would entitle these men to be recalled from any other work they might be doing with the railroad or to be recalled from any other walk of life to be placed in the position of steward. In the absence of any such agreement, the Commissioner is constrained to believe, therefore, that Williams and Thompson having served acceptably as waiters-in-charge and having proved their competence, therefore, to

do the work which was the equivalent, namely that a steward, were entitled to be considered and if found to have the necessary qualifications, to be appointed as stewards regardless of their race or color. It is clear from the record and from what has been said heretofore, that the employers representing the management of the Erie Railroad Dining Car Service did not consider either Williams or Thompson as it did white men for the position of steward. True, Williams was notified that his application would be considered in order, and it was stated by Collins in replying to Thompson's letter of application that he would be considered in order and after other persons who had been employed as steward were recalled from furlough. This was stated in Collins' letter and no place else so far as the record indicates. The Commissioner believes, therefore, that Williams and Thompson had a right to be considered for the job of steward as well as Wirtz and perhaps other persons.

#### [Continuing Offense]

The Commissioner is of the opinion, furthermore, that the act of discrimination continued from the time that Williams and Thompson applied up to the time when the position of steward was abolished. Every day in that period during which Williams and Thompson were denied the opportunity to be stewards, they were being deprived of a right to which they might have been entitled if they had been considered. This objection is not sustained.

Counsel for respondents argue in this connection that the complainants have offered nothing to substantiate their competence for the position of steward. The Commissioner believes that it has been established in the record and in the foregoing, that anyone who could serve as waiter-in-charge was competent to serve also as a steward (469). Testimony in the record indicates that railroad officials have testified that inaccuracies in reports etc., were not necessarily to be taken as an indication of a person's dishonesty or incompetence (311), and that such reports of alleged incompetency were not necessarily made a part of the service record of complainants (542). Examination of the trip reports and so forth would indicate that white stewards made mistakes as well as did the Negro complainants.

The Commissioner takes note of the argument that the Railroad Company was not abolishing

the position of steward in order to discriminate against persons because of their color. The point is made that by the abolishing of this position, a great sum of money was saved for the Railroad Company. The Commissioner does not need to rule on this point. It would have made no difference in expenditures had one of the complainants been appointed to the position of steward during the time when he was available and qualified.

It does seem clear from all that has been adduced in the hearing that the position of steward was, by company policy, given to white men only, and that the position of waiter-in-charge might be filled by colored as well as by white men.

#### FINDINGS OF FACT

From all the evidence adduced at the hearing, and from the foregoing, the Commissioner makes the following findings of fact:

1. The complainants, Edward Williams and Benjamin Thompson, are colored.
2. The respondent is the Erie Railroad Company, which has an office at 721 Jersey Avenue, Jersey City, New Jersey, where employees of the Dining Car Department of the railroad are employed.
3. Waiters and waiters-in-charge in the dining car service are subject to a union agreement; stewards are not subject to such agreement.
4. In the union agreement, provision is made whereby charges of inefficiency or other unsatisfactory conduct may be brought by management against waiters and waiters-in-charge.
5. The Erie Railroad management stated specific qualifications for those to be appointed to the position of steward as follows: Pass a physical examination; must have a passing mark on a mental aptitude test; must have a pleasing personality and good appearance; must be capable of handling the traveling public as a representative of management; must have ability to supervise employees under his jurisdiction; must be reliable; good morality.
6. Complainant Thompson was appointed waiter-in-charge of various dining cars on January 1, 1946; and on May 2, 1946, Complainant Williams was similarly appointed.

7. Williams and Thompson served as waiters until approximately May 3, 1947, at which time, the waiter-in-charge classification was abolished by respondent.
  8. Just prior to May 3, 1947, respondent had been employing a total of about 13 waiters-in-charge, of whom two were white; and 11, including the complainants, were Negroes.
  9. On or about May 3, 1947, respondent established the position of steward and/or filled such positions which for years prior thereto were never held by any employee, and promoted the two white waiters-in-charge to the position of steward; at the same time, demoting Negro waiters-in-charge, including complainants, to the position of waiter.
  10. Edward Williams, a complainant, applied in writing for the position of steward on May 19, 1949, and Benjamin Thompson, a complainant applied for the position of steward on September 21, 1950.
  11. On the above dates, complainants were serving as waiters in the dining car service.
  12. Those white persons who applied as stewards and were appointed during the period from May 19, 1949 to December 1, 1951, were appointed almost immediately after application.
  13. Williams, although his application was on file during all of the above period, received only an acknowledgment, and Thompson whose application was on file during most of this period, received only an acknowledgment and were not employed as stewards.
  14. It appears that all employees, including Williams and Thompson and all white stewards appointed, did take a physical examination.
  15. One of the qualifications stated for employment as steward was that of meeting a standard on an intelligence test; this standard was never applied to Williams and Thompson and it is not clear how it was applied to the white men who were appointed as stewards.
  16. In terms of the standard for the position of steward calling for supervisory experience, none of the white stewards ap-
- pointed, with the one possible exception of steward Matthews, had any experience previous to his appointment as steward along supervisory lines.
17. Complainants Williams and Thompson were educated in terms of years of schooling to a greater degree than was any white steward who was appointed.
  18. Complainants Williams and Thompson were of such character and ability that having served as waiters for a number of years, they were upgraded to the position of waiters-in-charge.
  19. Complainant Williams served a 30 day suspension for alleged misconduct in 1948, but having served this suspension, this was not held against him by management.
  20. Perquisites of the position of waiter-in-charge as compared with those of the position of steward indicate that the position of steward is one of higher prestige and status.
  21. There is no substantial difference in the responsibilities of waiters-in-charge and those of stewards, except that stewards are not required to have skill in waiting on tables.
  22. In the matter of keeping records, Negro complainants made mistakes and white stewards made mistakes; mistakes of Negro complainants were no more extensive or serious than those of white stewards.
  23. The complainants were qualified for the position of steward and were entitled to be considered for that position.
  24. The color of complainants, Williams and Thompson, was the determining factor in the failure of the management to consider them for the position of steward.

#### ORDER

The Erie Railroad Company is ordered herewith to cease and desist from discriminating against any and all employees because of their race or color in initial employment, or in upgrading within any area of competence, or in consideration for new positions which may be created, or in positions which are reestablished after having been abolished.

It is further ordered that counsel for com-

plainants and respondents meet as stipulated and determine the differential, if any, between the total compensation of stewards and complainants, Williams and Thompson, respectively, during these periods:

Williams from September 10, 1950 (when Kelberman was employed) to December 1, 1951; and

Thompson from October 3, 1950 (when Wirtz was employed) to December 1, 1951.

Parties are ordered to submit determination

to the Commissioner on or before September 7, 1956.

In the event of failure of the parties to agree, the hearing will be reopened for the receipt of testimony on the point of wage adjustment only.

/s/ Frederick M. Raubinger  
Commissioner of Education

/s/ John P. Milligan  
Assistant Commissioner of  
Education

## EMPLOYMENT

### Government Employees—Federal

The first report of the President's Committee on Government Employment Policy, established by Executive Order 10590 (printed at 1 Race Rel. L. Rep. 784), was made as of May 24, 1956. The purpose of that Committee is to promote equal opportunity for all persons, regardless of race, color, religion or national origin, for employment with the federal government. The report follows:

May 24, 1956.

Honorable DWIGHT D. EISENHOWER  
*The White House*

DEAR MR. PRESIDENT:

Transmitted herewith is the first report of the President's Committee on Government Employment Policy. This report covers the period from March 9, 1955, the date of the Committee's first meeting, through April 30, 1956, and is submitted in accordance with the requirements of Executive Order 10590.

Two statistical tables are also transmitted herewith, one outlining the disposition of complaints of discrimination reported to the Committee, and the second outlining the disposition of complaints of discrimination referred to the Committee for review and an advisory opinion.

We are pleased to report that substantial progress is being made in the elimination of discrimination in Federal government employment although this progress varies as to agency, area, and personnel.

We are indebted to you for the opportunity to help bring into practice the objective set forth in Executive Order 10590. We trust that the encouraging results achieved during our

first year will be augmented by further progress in the future.

Very respectfully,

MAXWELL ABBELL, *Chairman*.  
ARCHIBALD J. CAREY, JR.,  
*Vice Chairman*.  
CHARLES H. KENDALL.  
W. ARTHUR MCCOY.  
J. ERNEST WILKINS.  
*Alternate Public Members*:  
PHILIP J. MARFUGGI.  
JANE F. WARNOCK.  
\* \* \*

### FOREWORD

On January 18, 1955, President Eisenhower issued Executive Order 10590. This order established the President's Committee on Government Employment Policy and assigned to the Committee responsibility for assisting the departments and agencies in implementing the policy of equal opportunity for all persons employed in the Federal service, or applicants for such employment, regardless of race, color, religion, or national origin.

In the formulation of a program to implement

the policy prescribed by the President's order, the Committee decided to concentrate its efforts on two major objectives:

(1) To provide simple and readily accessible channels for investigation and adjudication of any complaint of discrimination on account of race, color, religion, or national origin made by any Government employee, or applicant for Government employment.

(2) To inaugurate a long-range program of education and persuasion designed to eliminate practices of discrimination and to invoke policies of equal treatment throughout the Government.

The Committee, determined to see that the President's policy of nondiscrimination is made effective, has been heartened to note the splendid cooperation by Government agencies in establishing administrative procedures for handling complaints and for acquainting employees and applicants with this policy.

This report sets forth in detail what the Committee has done to attain its two major objectives and the progress that has been made. It also appraises the task which lies ahead.

### FIRST REPORT OF THE PRESIDENT'S COMMITTEE ON GOVERNMENT EMPLOYMENT POLICY

#### *Responsibilities of Departments and Agencies Under Executive Order 10590*

Under the provisions of Executive Order No. 10590, the heads of departments and independent establishments are responsible for implementing the policy of nondiscrimination in Federal employment, including final responsibility for settling complaints alleging discrimination. This order also provides for the designation of Employment Policy Officers and Deputy Employment Policy Officers who are to be given specific operating responsibility for the entire program.

#### *Responsibilities of the Committee Under Executive Order 10590*

1. To promulgate rules and regulations.
2. To furnish standards and procedures for use of departments and agencies.
3. To review complaints of discrimination, and to render advisory opinions to the agency head.

4. To review continuously policies and procedures of agencies regarding personnel practices.
5. To make inquiries, investigations, and surveys.
6. To disseminate information.
7. To report progress to the President from time to time.

#### *What the Committee Has Done*

##### DISPOSITION OF CASES

The Committee's responsibility in the disposition of cases has been to serve as a Board of Review for those cases which are not settled by the departments to the satisfaction of the complainants. Its opinions have been advisory in nature. With regard to the type of personnel action involved, most of the complaints have been concerned with matters of separation or promotion. In each case considered the Committee has made an intensive review of the facts. Before rendering an opinion, the Committee has found it desirable in many cases to secure additional or more specific information than that contained in the files. The Committee has made personal investigations wherever necessary in order to secure such additional information.

Pursuant to the Committee's regulations, reports of all cases arising in the departments or agencies have been made to the Committee. It has thus been kept informed of all actions involving complaints. The Committee has also advised Employment Policy Officers as to the manner in which investigation methods might be strengthened and better results secured. Committee staff members have conferred with Employment Policy Officers, and given them advice which often enabled them to settle cases to the complete satisfaction of the complainant, thereby eliminating formal appeals to the Committee.

Acting always in an advisory capacity, the Committee has thus been of service in the fair and just disposition of complaints. With ultimate responsibility always placed upon the department, the Committee has been able to perform this service function without assuming the role of an enforcement agency.

##### DISTRIBUTION OF MATERIALS

At its organizational meeting in March of 1955, the Committee determined that one of

its responsibilities was to inform the heads of all departments and independent agencies of the provisions of the Executive order. Consequently it issued its first memorandum on March 31, 1955, calling attention to these provisions and enclosing copies of the regulations and procedures of the Committee, adopted to assist in carrying out its responsibilities. Subsequently seven additional memoranda have been issued relating to various aspects of the Committee's work.

The second memorandum, issued in June 1955, contained detailed information on the procedures for handling complaints under the new Executive order, and a list of suggested items to be covered in investigations of these complaints. These two documents have been particularly helpful to Employment Policy Officers in conducting thorough investigations. A third memorandum transmitted a suggested guide to be used in supervisory training programs and in management conferences for training in the specific problems of discrimination.

Memorandum number four, issued in August 1955, was a further attempt to help the Employment Policy Officers in their job performances. The Committee recognized that one of the difficulties facing these officers was that of ascertaining the extent to which the nondiscrimination policy was being observed in the field agencies. Realizing that many agencies have formal programs for the inspection of personnel functions in the field, the Committee believed that such programs could be useful in securing information on the nondiscrimination policy. This particular memorandum, therefore, contained a list of suggested items to be included in these inspection programs.

The Committee also regarded it as essential that Federal employees be thoroughly familiar with the policy and the complaint procedures. For the purpose of making such information easily available, the Committee published a pamphlet entitled "Some Questions and Answers on the Non-Discrimination Policy of the Federal Government." This was issued with memorandum number five in November 1955. The Committee has supplied these pamphlets in quantity to the various departments and agencies.

Three additional memoranda should be noted. One, in January of 1956, initiated a survey of Negro employees in Federal agencies in six selected areas of the Nation. This survey is

discussed more fully below. The seventh memorandum contained a checklist for Employment Policy Officers for use by them and their Deputy Officers in checking their full responsibilities under Executive Order 10590. The eighth memorandum, issued in February 1956, contained a digest of typical complaints of discrimination.

The Committee will continue to issue these memoranda as it develops information and suggestions which it feels will be helpful to the Employment Policy Officers.

#### RELATIONSHIPS WITH PRIVATE AGENCIES

It is evident that the entire program of the nondiscrimination policy of the Federal Government involves not only Federal administrators and their employees, but also the interests of those national organizations which have a particular concern with the problems of minority groups. With these groups, the Committee has attempted to establish a cordial working relationship and a free exchange of information and ideas.

Officials of a number of such organizations have been invited to and have attended meetings of the Committee and have contributed their thinking to its work. Their advice has been both constructive and stimulating.

The Committee has kept these agencies informed of its work by mailing to them copies of the memoranda issued to Employment Policy Officers, and by sending press releases of special interest to them. In January of 1956, a pamphlet entitled "The Policy of Non-Discrimination in Employment in the Federal Government" was mailed to every major intergroup agency in the Nation, accompanied by a Fact Sheet for civil-service applicants which stressed the non-discrimination policy. These were developed particularly for distribution by private agencies as a means of acquainting the general public with the Government's policy.

Finally, with a view toward achieving a more direct contact with these national groups, the Committee has planned a one-day conference to be held in Washington in May of 1956. Representatives of these groups will be invited to sit down and discuss with the Committee the issues which are of common concern. This policy of communication and discussion with national organizations which have had long experience in the field of human relations is one which the

Committee deems of great importance to the success of its work.

#### AREA CONFERENCES

One of the difficulties with which the Committee has been faced continually is that of its relationship with Government establishments in the field. The Federal Government is by its very nature vast and complex, and the Committee has been conscious of the fact that a complete understanding of the Executive order may not always be had in the field establishments without an opportunity for personal discussion.

With this in mind, the Committee began in November 1955 to conduct conferences outside of Washington with the administrative heads and the Deputy Employment Policy Officers of Federal establishments in major cities. Arrangements were in every case worked out with the cooperation and the understanding of the department heads in Washington.

The first of these was held in Charleston, W. Va., with approximately 25 administrators in that area. Members of the Committee discussed with them the provisions of the Executive order and the regulations, and followed with a round-table discussion on the various problems involved, including the methods of making investigations, handling complaints, and the dissemination of information.

The results of this conference were so satisfactory that it was decided to make similar conferences a basic part of the Committee's program. The second conference was held in Baltimore in January 1956, with about 60 in attendance. During March, the Committee held two conferences each in Atlanta, Ga.; New Orleans, La.; and Dallas, Tex., with about 80 Government administrators in each of these areas. These conferences followed the pattern of the one held at Charleston, W. Va.

Interspersed between the first two of these conferences was a session held in Washington, D. C., on December 16, 1955, with the Employment Policy Officers of the various departments and agencies; this was an effective meeting. The basic policy of the administration was discussed as were the various problems and procedures which arise in the application of the policy.

These conferences have proved to be of great value. They have served an excellent purpose in providing the Committee with firsthand in-

formation concerning operating problems in the field. They have also enabled the Committee to clear away misconceptions about the Government's policy of nondiscrimination. Field administrators have had an opportunity to discuss their problems and to secure the benefits of group thinking with respect to the most effective methods of dealing with them. Free and frank discussions have been characteristic of all the sessions.

#### SURVEY OF NEGRO EMPLOYEES

In one vital particular, the Committee has been faced with an almost complete lack of information—namely, the number and grade distribution of Federal employees who are members of minority groups. No systematic survey designed to secure such information has ever been made. Whatever information is available is largely piecemeal and out of date. The result is that the Committee has not been entirely certain of the extent of the total problem. Its only current information comes from isolated situations in which a survey has been made as the result of investigating a particular complaint.

The difficulties of attempting to identify religious minorities or members of nationality groups in the Federal service are obvious. Such information does not exist in records—nor does racial identity, for that matter. Even if such statistics were recorded, it would be prohibitive from the standpoint of workload to survey the more than 2 million employees in the service for purposes of identification.

Recognizing the difficulties and necessary limitations incident to an employment survey, the Committee has still been conscious of the handicap of lack of information concerning the size and character of the problem with which it is dealing. It has not known, for example, about the general proportion of Negroes to white persons in Federal employment. The degree and extent to which Negroes have advanced to positions of responsibility is not known. The Committee has, in a sense, been working with the pieces of the puzzle without knowing the overall picture.

After much discussion and consultation, the Committee arrived at a plan which avoids the limitations mentioned, yet can give the Committee a reasonably comprehensive picture of the problem. Discarding a survey of all minority groups as a near impossibility, and of the total of all Federal employees as impracticable, the

Committee concluded that a survey of Negro employees alone in six selected areas of the Nation was most feasible. In the first place, the great majority of the Committee's cases have concerned Negro-Americans. Secondly, Negro employees can be identified in most instances by a visual count, eliminating the problem of lack of information on records. The six areas selected contain a large number of Federal agencies and have large Negro populations. It was believed that employment conditions in these areas would be fairly representative of those throughout the service.

In January 1956, a memorandum was sent to the heads of all departments and agencies requesting that such a survey be made in their offices located in the following cities: Chicago, Ill.; Los Angeles, Calif.; Mobile, Ala.; Norfolk and Portsmouth, Va.; St. Louis, Mo.; and Washington, D. C. For the classified service the survey included the total number of Negroes by series code and grade level and the number employed in supervisory positions. For wage-board positions, the total number of Negroes by job titles and the number employed in supervisory positions was requested.

When this information is assembled, the Committee will have a complete picture of Negro employment in the Federal Government in six strategic areas. It will be the most comprehensive study of its kind ever made, involving about one-fifth of all Federal employees. The information obtained will be of significant value to the Committee, as well as to the departments and agencies, in appraising the nature and scope of existing problems of minority employment, and in formulating an effective program to make the nondiscrimination policy a meaningful one.

#### *What Lies Ahead*

The Committee sees its major task as that of continuing its policy of helping the various departments and agencies of the Federal Government in the discharge of their responsibilities in connection with the nondiscrimination policy. This will of course mean a continuance of its work of providing advice on the complaint procedures and of reviewing those complaints appealed to it under its regulations. Another area of assistance will be that of guiding the process of making the philosophy of equal job oppor-

tunity an integral part of the personnel actions of the executive branch of the Federal Government.

This is essentially a long-range educational process. A part of this process should be a continuance of the Committee's work in meeting with the heads of the field agencies. In the light of the total task, the Committee has made only a beginning on this project. There remain a great many other important population centers in which major governmental operations are being conducted. Personal conferences in these areas can do much to further the understanding of the fair employment policy. This project is high on the Committee's list of objectives for the immediate future.

A second approach in terms of the long view is that of expanding the process of training supervisors in the philosophy and the implementation of the Executive order. Since no two agencies have approached this task in the same manner, this project needs to be worked out by the Committee staff in consultation with the individual agencies. Some agencies have already made considerable progress in embodying the fair employment policy in their personnel training; others have not yet adopted it as a necessary part of such training. The success of this educational process will largely be reached by continued consultation between the Committee staff and the personnel and training heads of the various agencies.

There is a third area of work which calls for much further effort. With over 2 million employees involved in the Federal civil service, the Committee is still faced with the task of making its existence and its functions known to many of these workers, and of acquainting them with their rights under the Executive order. The Committee plans to develop its "public relations," both with employees and with those organizations which are concerned with the rights of minority groups. When the American public is thoroughly acquainted with the functions of the Committee and with the objectives of the Executive order, the Committee's goal will be much nearer realization.

Much progress has been made in eliminating discrimination in Federal employment. With persistence and patience, this progress will continue. It is to this continued advancement that the Committee dedicates itself.

[These two tables accompanied the committee's report:]

*Disposition of Complaints of Discrimination Referred to the Committee for Review and an Advisory Opinion  
Between January 18, 1955, and April 30, 1956*

Disposition	Failure of Appointment		Failure of Promotion		Separation		Other**		Total
	Negroes	Others*	Negroes	Others*	Negroes	Others*	Negroes	Others*	
Corrective action recommended.....			3						3
Complaint withdrawn.....							1		1
Finding of no discrimination made.....	4		5	1	16		4		30
<b>TOTAL.....</b>	<b>4</b>		<b>8</b>	<b>1</b>	<b>16</b>		<b>5</b>		<b>34</b>

\*Includes complaints from Jews, Indians, Seventh-day Adventists, Mexican-Americans, Catholics, etc.

\*\*Includes complaints regarding types of assignment, hours of duty, etc.

**TOTAL COMPLAINTS:** 34  
33 from Negroes  
1 from Mexican-American

*Disposition of Complaints of Discrimination Reported to the Committee  
Between January 18, 1955, and April 30, 1956*

Disposition	Failure of Appointment		Failure of Promotion		Separation		Other**		Total
	Negroes	Others*	Negroes	Others*	Negroes	Others*	Negroes	Others*	
Corrective action taken.....	8		10		7	3	5	1	34
Complainant satisfied with explanation.....	8		7	1	2		4		22
Complainant failed to prosecute complaint.....	6		3		5	1	2		17
Finding of no discrimination made.....	22	2	19	3	24	1	13	3	87
<b>TOTAL.....</b>	<b>44</b>	<b>2</b>	<b>39</b>	<b>4</b>	<b>38</b>	<b>5</b>	<b>24</b>	<b>4</b>	<b>160</b>

\*Includes complaints from Jews, Indians, Mexican-Americans, Catholics, Seventh-day Adventists, etc.

\*\*Includes complaints regarding types of assignment, hours of duty, suspensions, etc.

**TOTAL COMPLAINTS:** 160  
144 from Negroes  
2 from Jews  
1 from Puerto Rican  
1 from German  
1 from Catholic  
2 religion (not specified)  
3 from Mexican-Americans  
2 from Indians  
2 from Poles  
1 from non-Jew  
1 from Yugoslavian

## MILITARY SERVICE

### Selective Service System—Federal Statutes

One of the persons active in a boycott conducted by Negroes against the Montgomery City (Bus) Lines had been registered under the Selective Service System for military training and service but deferred from service because of his classification as a minister. The local Selective Service Board in Montgomery, Alabama, later changed the classification of the registrant to 1-A. Thereafter the Director of Selective Service directed the local board to reopen the case of the registrant. Set out below is an exchange of correspondence between Senator

**Richard Russell, Chairman of the Armed Services Committee of the United States Senate, and the Director of Selective Service which outlines the action taken in this case.**

October 4, 1956

Lieutenant General Lewis B. Hershey, Director  
Selective Service System  
451 Indiana Avenue  
Washington, D. C.

Dear General Hershey:

This refers to my continued interest in the case of Fred B. Gray, about whom we have previously corresponded.

While I recognize your responsibility for assuring fair treatment to all registrants, in my view there is a concomitant responsibility to members of local boards who patriotically bear onerous duties without compensation.

The information I have regarding the Gray case is not complete, but that which I do possess gives me concern that this may be another instance of a member of an organized minority group, who thus is in a position to allege discrimination, in fact receiving preferential treatment in comparison to that which would be afforded members of an unorganized majority. So that I may give further consideration to this case to determine whether changes in the Selective Service laws are indicated thereby, I could appreciate having your comments in reply to the issues raised in the succeeding paragraphs.

If I have been correctly informed, the time lapse between affirmation by the State Appeals Board of Gray's I-A classification by the local board and the decision affirming the classification by the Presidential Appeals Board is from February 21, 1956 until August 2, 1956. I would appreciate a report outlining the reasons for the delay in reaching a decision on the case, including an explanation of the period that the case remained in your office before it was referred to the Presidential Appeals Board. I would also like to know the provision of law or regulations that operated to postpone Gray's induction while the file was pending in your office.

My understanding is that Selective Service Headquarters requested that Gray's induction be postponed for thirty days after a decision by the Presidential Appeals Board affirming the local board's classification and that this action was taken on the basis of a report that Gray

had assumed full time pastoral duties during the period while his file was in your office and the case subsequently appealed to the Presidential Board. This procedure would seem to render nugatory the provision of Section 10(b)(3) of the Universal Military Training and Service Act that "the determination of the President shall be final". In view of your apparent power to postpone an induction despite this language I should appreciate having your opinion of the meaning of the quoted provision. I would also appreciate having a detailed report on the number of other cases in which Selective Service Headquarters has asked the local board to postpone induction after the Presidential Appeals Board has affirmed a I-A classification.

My attention has been drawn to Section 1625.1 of the Selective Service Regulations providing as follows: "Each classified registrant and each person who has filed a request for the registrant's deferment shall, within ten days after it occurs, report to the local board in writing any fact that may result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Will you please inform me whether the assumption of the full pastoral duties by Gray, which presumably was the basis of a request that his induction be postponed even after the Presidential Appeals Board had decided against him, was reported to the local board in accordance with the quoted regulation?

This case prompts me to consider the desirability of providing a cut-off date that would be determinative of a registrant's status and entitlement to exemption or deferment following an exhaustion of the appeals procedures. If, as in this case, the lengthy appeals procedure involving substantial time and expense can be rendered moot by a change of status voluntarily entered into after an appeal has been taken on the basis of a pre-existing status, it would seem that some revision in Selective Service procedures and regulations is indicated.

Sincerely yours,  
/s/ Richard Russell

\* \* \*

October 25, 1956

The Honorable Richard B. Russell  
Chairman, Committee on Armed Services  
United States Senate

Dear Mr. Chairman:

Your letter relative to the Selective Service case of Fred D. Gray, a registrant of the Montgomery, Alabama, local board, was received by me on October 12. I am pleased to furnish my comments on the issues which you raise concerning Selective Service procedures.

In enacting the Selective Service Law in 1940, and in the present Selective Service Law, the Congress wisely placed the classification of registrants in the hands of the people themselves, and established in each community in the country a board of local citizens as an instrument for classifying their own citizens. I supported this provision not only before the Congress in 1940 and in 1948, but also, over the years, I have defended it and staunchly resisted the many attempts made to modify it. I am sure your Committee is fully aware of how jealously I have guarded the prerogatives of these citizen-manned boards, and have resisted the many attempts made to invade their prerogatives.

No one could be more aware than your Committee and myself, of the great debt which this country owes to the local board members, who, over the years, have performed their difficult task without compensation solely through a sense of patriotic duty. Without the services of these patriotic citizens, the Selective Service operation could not have succeeded. Over the years, I have pointed with pride to this unparalleled accomplishment in the history of the country, and have, time and time again, acknowledged the great obligation which I, as Director of Selective Service, owe to these men.

As you have stated in your letter, the Director of Selective Service has responsibility for assuring fair treatment of all registrants, but over and above this responsibility, he has the further duty, imposed by his oath of office, to insure that all of the provisions of the law are properly administered.

As stated to you in my letter of October 3, 1956, my action in requesting the local board to reopen and consider the new evidence in the case of registrant Gray, was taken solely on the basis

of this new evidence which indicated that he could qualify for a ministerial exemption, without regard to the denomination to which this registrant belonged, or without regard to his color. The sole question that was posed was whether, under this new evidence, the registrant qualified for a ministerial exemption as an ordained minister of religion, and that question could only be resolved by the local board, after reopening the case and considering the new evidence.

On February 7, 1956, the local board reclassified the registrant in Class I-A, after having exempted him for 5 years as a minister of religion. During the last two years of this 5-year exempt period, the evidence in the possession of the local board clearly showed that his ministerial activities were on a part-time basis, and that he spent part of his time in the practice of law. The registrant appealed to the Alabama State Board of Appeal, and the Appeal Board placed him in Class I-A on February 21, 1956. On February 27, 1956, the registrant's file was forwarded to this Headquarters for review, to determine if the Director of Selective Service should exercise the duty placed upon him by law to appeal to the Presidential Appeal Board, if, in his opinion, such action was necessary to carry out the provisions of the law. Before making this determination, the Director of Selective Service must be fully familiar with all of the facts of record in a case. In the case of ministers of religion, these facts must be related not only to the provisions of law governing exemptions for ministers, but must also be evaluated in the light of court decisions interpreting the provisions of the law in their application to many different facts in many different cases. As you are aware, the Supreme Court of the United States has considered and decided numerous cases. Those cases relating to persons who are full-time ministers of religion are not too difficult, but those relating to persons who perform varying periods of ministerial duties are very complex. The time between February 29, 1956, when the file was received in this Headquarters, and May 24, 1956, the date on which I appealed this case to the President, was devoted to this exhaustive examination of the facts and the law, in order to determine my responsibility for appeal.

Another thing which complicated review of this case was a lack of evidence establishing a ground upon which the local board might have

reopened the ministerial exempt classification of the registrant and placed him in Class I-A. The facts in the case, as elicited by the local board from the registrant himself, plainly showed that at the time of this reopening, the registrant's activities as a minister of religion had increased beyond that for which they had been exempting him for the two years immediately preceding the reopening. Immediately following the reopening, this Headquarters had also received a letter from the State Director, advising that the local board felt compelled to take some action to revoke the registrant's ministerial classification, due to the tremendous local pressures being brought to bear on the local board because of the registrant's activities in the bus boycott then existing in Montgomery. The case was referred to the Presidential Appeal Board on May 24, 1956, where it remained under consideration by the members of this board until August 2, 1956, at which time registrant Gray was classified by that board into Class I-A by a vote of 2 to 1.

The Presidential Appeal Board is an agency of the President, and is not under the jurisdiction of the Director of Selective Service. The three members of this board are appointed by the President, and none of the incumbents live in the District of Columbia. One lives in nearby Maryland, one in Baltimore, and the third member in Ohio. I am informed that the Appeal Board has no regular time to meet, and normally does not meet oftener than once a month. Experience indicates that the time that the case of registrant Gray remained before the board for consideration is about the average processing period. The 30-day postponement of induction following the appeal board classification and issuance to registrant Gray of an order to report for induction was given by me in this registrant's case on August 13, 1956, to afford the registrant's church an opportunity to present to the local board new evidence that this registrant had assumed full-time pastoral service at his church. It has never been considered that this procedure would in any way nullify the provision of the law that the determination of the President would be final. There is no question that the determination of the President is final, based on the facts of record in the case at the time it was considered. The Selective Service Regulations provide that both the State and Presidential Appeal Board, in making their determination on appeal, can consider only the facts in the registrant's file which were of record in the local board and con-

sidered by it in making its classification. The postponement of induction to which you refer, was to afford the local board an opportunity to consider new evidence not previously considered by it, and, therefore, not a part of the registrant's file when it was considered by the Presidential Appeal Board. This action to assure consideration of the new evidence in the case would not conflict with the provisions of Section 10(b)(3) of the Regulations, as the determination of the President was final as to the evidence of record at the time the case was considered by the Presidential Appeal Board.

The information presented to me showed that registrant Gray assumed full pastoral duties with his church on August 9, 1956. At that time, the officials of the church duly notified the local board, and the local board advised the church that it did not have the authority to reopen the registrant's classification, inasmuch as his order to report for induction had been issued. The report to the local board by the church of the change in the registrant's status, as shown by the records in the case, indicates that the church complied with the provisions of section 1625.1 of the Selective Service Regulations, and the letter of the local board to the church, advising of its inability to reopen because the order for induction had already been issued, appears to be in compliance with the provisions of section 1625.4 of the Selective Service Regulations.

After considering the new evidence which had been submitted to me concerning the registrant's assumption of full pastoral duties, on August 9, 1956, by the Interdenominational Ministerial Alliance and the Joint Board of Elders and Deacons of the Holt Street Church of Christ of Montgomery, on September 5, 1956, requested the local board to reopen the case and consider this new evidence.

I was subsequently advised, through the State Director, that the local board refused to reopen the case. Section 1625.1 of the Selective Service Regulations provides that local boards shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service, and upon receipt of such request, shall immediately cancel any order to report for induction which has been issued to the registrant. These presidential regulations, as you are aware, have the full force and effect of law, and each local board member has subscribed to an oath to carry out all of the provi-

sions of law. While I felt sure that the local board was fully aware that a request under this provision was mandatory, in order that there be no question whatsoever, I subsequently, by telegram, directed the local board to reopen the registrant's case and consider the new evidence which they had previously declined to consider solely on the grounds that the order to report for induction had previously been issued, and that they had no authority, under section 1625.4 of the Regulations, to do so. The local board again refused to comply with the mandatory provisions of the regulations, and three members of the local board resigned, stating as a reason for such resignation, their refusal to take further action in the case. I have accepted their resignations.

As requested in your letter, I am pleased to report on the cases in which National Headquarters of Selective Service has asked local boards to reopen classification after the Presidential Appeal Board has classified the registrant. In the interest of expediting the matter, I have made no attempt to secure information on the cases in which the State Directors of the various states have taken similar action, nor in those instances where the local boards, themselves, have requested either the State or the National Director to reopen a classification. To further expedite the matter, I am using the records for only the last three years, as it would take considerable time to search all the files, which, as you know, go back as far as 1940.

The records reveal that during this period of approximately three years, beginning in August 1953, to the present time, there have been 84 cases in which the Director of Selective Service has found it necessary to take some action in order to provide a reconsideration of the classification by the local board after the registrant had been classified by the Presidential Appeal Board.

In 45 of these cases, action was necessary because of Supreme Court decisions in the cases of *U.S. v. Dickinson*—346 U.S. 389, 74 S.Ct. 152 *U.S. v. Gonzales*—348 U.S. 407, 75 S. Ct. 409 *U.S. v. Taffs*—208 F2d. 209 Cer.Den., 347 U.S. 928, 74 S.Ct. 532

All of these cases related to the classification of ministers or conscientious objectors in which the determination of the Presidential Appeal Board had been made prior to the Supreme Court decision and in which the holdings made it necessary that further consideration be given to the classification of these registrants by their local boards.

In addition to the above, I find that there are 34 other cases which were reopened for various reasons after classification by the Presidential Appeal Board. These have been grouped by type, as follows:

Occupational	14
Reopened following the submission of new evidence by employers.	
In this group, 12 of the 14 were technicians employed at the Savannah River Project of the Atomic Energy Commission.	
Ministerial	8
In this group was a Baptist, a Catholic Lay Brother, three Mormon Missionaries, a Wycliffe Bible Translator, and a Youth for Christ. Reopening was based on submission of new evidence regarding ministerial status or religious activities.	
Procedural errors	5
Procedural errors which affected the rights of the registrants were found in these cases.	
Conscientious objectors	2
Evidence insufficient under Supreme Court decision.	
Hardship	1
Submission of new evidence in form of medical certificates.	
Medical missionary	2
Reopened because of the Dickinson case and evidence regarding religious activities.	
Students	2
A graduate student and a theological student. New evidence of student activities was submitted.	
The Congress, in order to insure maximum flexibility in the operation of Selective Service in its enactment of the 1940 and 1948 Selective Service Acts, purposely refused to delineate all of the details of the Selective Service procedures, and left the President free to promulgate such rules as he determined were necessary to the proper administration of the provisions of the law. This wisdom of the Congress has been borne out time and time again in the individual cases that have come to the attention of many of the members of the Congress itself, and is attested to by the fact that since 1940, the System has handled more than 78 million classifica-	

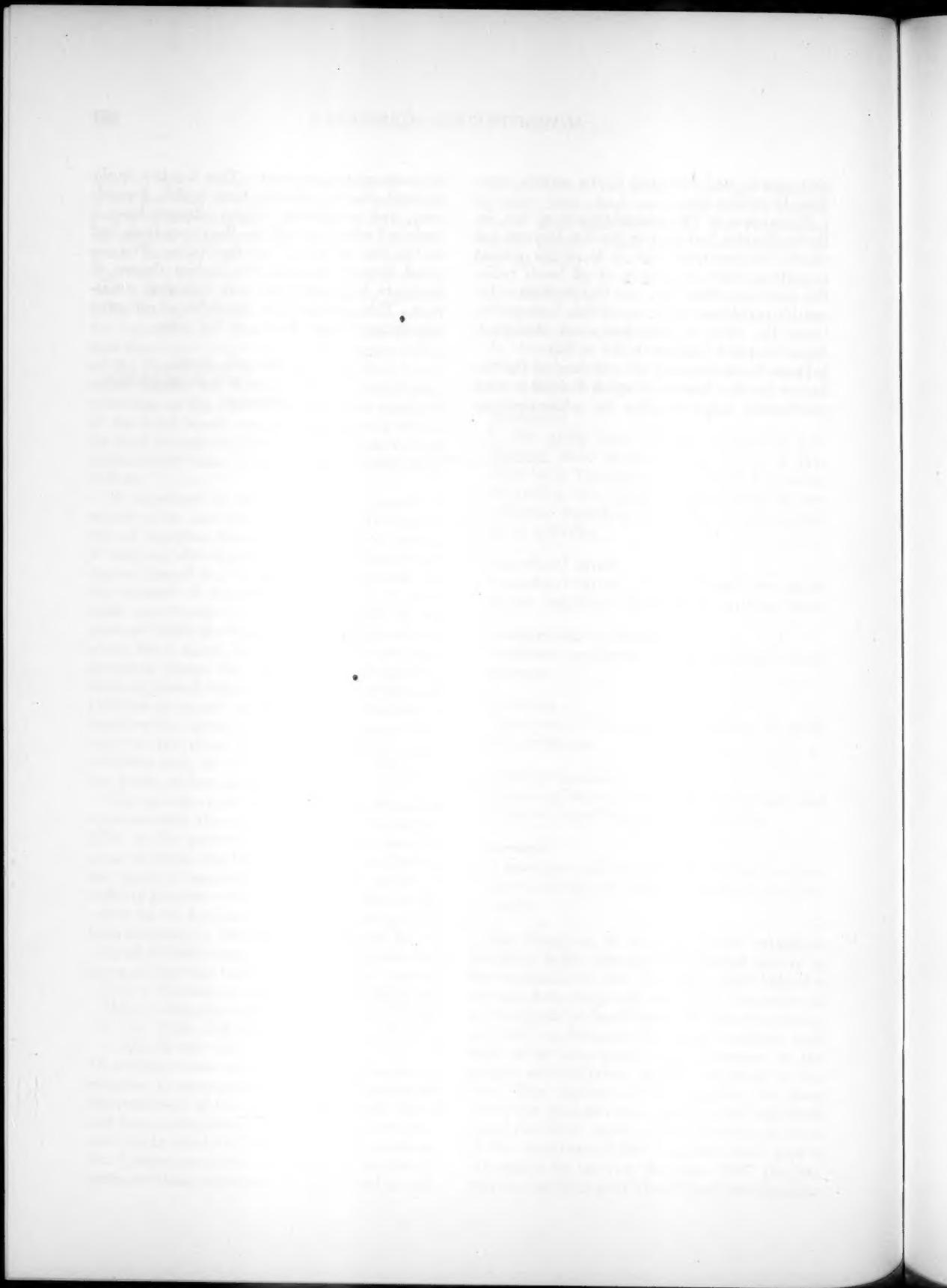
tion actions and inducted in the service more than 15 million men.

Experience in the administration of the Selective Service System over the last 16 years has clearly demonstrated that it is of the utmost importance that the system at all levels retain this maximum flexibility, and this flexibility cannot be maintained if a cut-off date operates to freeze the status in individual cases, disregarding subsequent changes in law or facts.

From the standpoint of operation of the Selective Service System, a cut-off date, if it were practicable, might simplify the administration.

But men are not inanimate. They live in a world of rapid changes affecting their health, dependency, and occupation. These changes have a profound effect not only on their own lives, but on the lives of others, and the Nation. The national interest demands the highest degree of flexibility to meet these ever changing conditions. This rules out the possibility of effective employment of any hard and fast rules.

Sincerely yours,  
s/ LEWIS B. HERSHAY  
Director



# ATTORNEYS GENERAL

## EDUCATION

### Colleges and Universities—Louisiana

Act No. 15 of the 1956 session of the Louisiana legislature (printed as House Bill No. 437 at 1 Race Rel. L. Rep. 730) provides additional requirements for admission of students to publicly financed institutions of higher learning in the state, including a certificate of eligibility and good moral character to be furnished by county school officials. After the passage of that act the president of Louisiana Polytechnic Institute inquired of the state Attorney General whether the act should be construed to apply to students already enrolled as well as new applicants for admission. The Attorney General, in an opinion of July 23, 1956, which was affirmed by an opinion of August 17, 1956, stated that the act should be construed to apply only to new applicants for admission.

July 23, 1956

Honorable R. L. Ropp  
President  
Louisiana Polytechnic Institute  
Ruston, Louisiana

Dear President Ropp:

On July 20, 1956, an opinion was addressed to you by this office in reply to your request for an interpretation of Act 15 of 1956, establishing certain requirements for admittance to publicly financed institutions of higher learning in the State. After reviewing this opinion, I have decided that it should be recalled, and the opinion of this office is now as follows:

The question for decision is whether Act 15 affects students presently enrolled in such institutions prior to the effective date of Act 15, or whether it affects only those students who are enrolling for the first time, beginning at the opening of the 1956-57 semester.

It is our opinion that the referred to act covers only the admittance of persons in said institutions for the first time, and does not apply to those persons who are already enrolled or registered, for the following reasons:

The title of Act 115 uses the words "*certain requirements for admittance*" (emphasis supplied). Section 1 of the act in part uses the language, ". . . shall be registered at or admitted to any publicly financed institution of higher learning." It thus appears that the title of the

act provides for admittance and Section 1 also uses the words "admitted to" with the added words "shall be registered at," and it is thus apparent that "shall be registered" and "admitted to" means the same thing when taken in connection with the title. "Matriculation" is the "act of matriculating; to matriculate is to enroll or to enter in a register, or specifically to enter or admit to membership in a college or university by enrolling the name in a register." (W. & P., p. 39, citing State v. Regents of University System of Georgia, 175 S.E. 567, 179 Ga. 210). "To register" is to "enter in a register; to record formally; to enroll; to enter in a list." (W. & P., p. 648).

If the language had been (Section 1) "shall remain registered" instead of "shall be registered," or if the word "re-registered" had been used, there may be grounds for holding that students already registered would have to obtain the certificate of eligibility and good moral character referred to in Section 1. The language used in the title and that in Section 1 seems clearly to show that when once a student has been entered into such institution and registered, no further certification of eligibility and good moral character is contemplated by the act, and that the act only refers to those persons who shall register or shall enter the institution after the effective date of the act.

Section 2 in part makes certain annual requirements of those seeking admittance to such

institutions, and Section 3 in part provides for notice to students graduating from high schools of the requirements for certification, and the institution shall incorporate in their annual catalogs proper notice that the said certificate is an essential requirement for admission. Section 2 further provides for a sufficient number of forms of certificates to be prepared by the Department of Education, to be furnished the parish superintendents to meet the said annual requirements for those seeking admission to the said institutions. Such annual requirements can only mean the estimate of requirements based upon the records annually made of those persons graduating from the high schools. Doubtless, such annual requirements as are mentioned are based upon the graduates of schools annually. If the legislature had intended for the Department of Education or any other agency to go back to old records to determine the eligibility or good moral character, instead of the usual annual records showing high school graduates, it seems that language would have been used to reflect this intent. From a reading of this act, it seems clear that the legislature did not express itself in such a way as to require a graduate student who had long since graduated from a high school to go back to the principal or superintendent of the school to obtain a certificate of eligibility or good moral character, particularly when the principal and superintendent may no longer hold such positions and all of the eligibility qualifications have long since been determined in the same institution of higher learning. It would only be necessary for such a certification to be obtained when such a graduate student has never entered or registered in the particular institution of higher learning.

Reiterating what has been said above, we are now of the opinion that Act 15 applies only to those students who have not previously entered or registered in an institution of higher learning in the state, which is to say that those students who have already entered or registered prior to the effective date of the act, are not required to furnish the certificate of eligibility and good moral character provided for in the act.

Sincerely yours,  
 Jack P. F. Gremillion  
 Attorney General

\* \* \*

August 17, 1956

Honorable W. M. Rainach  
 Chairman  
 Joint Legislative Committee  
 Homer, Louisiana

In re: *Act 15 of 1956*

Dear Senator Rainach:

As you will recall, on July 23, 1956 this office rendered an opinion to the Honorable R. L. Ropp, President of the Louisiana Polytechnic Institute at Ruston, Louisiana, in which we ruled that the said act applied only to those students who have not previously entered or registered in an institution of higher learning in the state.

As you will recall, at your request and the request of your attorney, Mr. W. M. Shaw, I agreed to review this opinion on the basis of certain evidence which you were to present.

I have before me three affidavits submitted to me on August 10, 1956, which affidavits, of course, are self-explanatory, and suffice it to say do not need discussion here.

I have researched the question presented by the ruling of this office very thoroughly. It has been a matter of great concern to me, and I have requested and received the opinion of many outstanding attorneys in reconsideration of the ruling stated in the original opinion under date of July 23, 1956.

With the above in mind, I hereby wish to advise you as follows, to-wit:

The interpretation and construction of statutes under our system of law has been given much study and the rules and jurisprudence are, for the most part, clear and adequate. No good purpose would be served in setting out said rules and it will seemingly suffice to refer the reader to Articles 18 to 21 of the Revised Civil Code and the authorities cited in the footnotes. Additional cases may, however, be found in the Louisiana Digest under the heading of "Statutes".

In interpreting any legislative enactment, one must first ascertain whether or not the act is ambiguous and reasonably susceptible of more than one interpretation. If the law is free of ambiguity, it must be accepted and interpreted as written. R.C.C. Article 18; Gulf Refining Co. v. Glassell, 186 La. 190, 171 So. 846. If, however, the act is ambiguous, the intent of the enactment must be sought. R.C.C. Article 18; Houghton v. Hall, 177 La. 237, 148 So. 37.

We have determined that Act 15 of 1956 is not ambiguous and therefore the intent of the Legislature is stated in clear language. This determination appears to be correct: (1) As a whole; Bradley v. Swift & Co., 167 La. 249, 119 So. 37; (2) In the light of conditions existing at the time the act was enacted; Union Sulphur Co. v. Parish of Calcasieu, 153 La. 857, 96 So. 787; (3) The words of the act were given their ordinary meaning; R.C.C. Article 14, Vicksburg A. & S. Railway Co. v. L. A. & A. R. Co., 136 La. 691, 65 So. 553; (4) Except those words pertaining to educational institutions which were interpreted in accordance with their accepted and received meaning among educators; R.C.C. Article 15; (5) Giving weight to the administrative interpretation of the statute; State v. Southern Pacific Co., 137 La. 435, 68 So. 619; (6) The act being a criminal act was interpreted strictly as being applicable only to situations clearly covered thereby; Cendon v. H. G. Hill Stores, 171 La. 341, 131 So. 41.

In the interest of brevity and clarity, the following words as hereafter used herein shall, unless the context requires otherwise, be given the following meaning:

1. Act 15 of 1956 will be referred to as "the Act" or "Act 15".
2. "Publicly financed Institution of Higher Learning in this State" will be referred to as "Institution" or "Institution of Higher Learning".
3. A student that has heretofore been admitted and registered at an Institution of Higher Learning will be referred to as "old student".
4. A student that is to be hereafter admitted to an Institution of Higher Learning will be referred to as "new student".
5. The certificate of eligibility and good moral character as described in the act will be referred to as "certificate" or "certificate of eligibility".
6. Department of Education of the State of Louisiana will be referred to as "Department of Education".
7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College will be referred to as "L.S.U." or "Board of Supervisors of L.S.U."

The key words of Act 15 are defined by

Webster's New International Dictionary, Second Edition, as follows:

**1. Admit:** (a) to suffer to enter; to grant or have capacity to allow, entrance, whether into a place, the mine or consideration; to receive; accept. (b) To allow one to enter on an office or to enjoy a privilege; to recognize as qualified for a franchise; as to admit an attorney to practice law.

**2. Admittance:** Act of admitting; permission to enter; admission; also, actual entrance.

**3. Admission:** Act or practice of admitting; permission or right to enter a place or school, into society, etc.; admittance, entrance, access.

Synonyms—initiation; entrance.

Antonyms—expulsion; ejection; exit; departure.

**4. Entry:** (a) To go or come in, to a place or condition; to make or effect an entrance. (b) To make a beginning; to take the first step; engage; start; as to enter into business or upon a career, or an account of one's travel or on a long journey; also, to get admission or to be admitted to; as to enter into society. (c) To inscribe; enroll, record; as to enter a name or a date in a book or a book in a catalogue.

**5. Entrance:** Act of entering; ingress, as, the entrance of a cavalcade into a street; figuratively, introduction, debut or the like; as entrance to office; entrance into college.

Synonyms—entry; access; admission

Antonyms—exit, egress

**6. Entrant:** One who enters, especially as a new member; also an applicant for admission.

**7. Enroll:** To insert in a roll; to register or enter in a list or catalogue or on rolls of court; hence, to record.

**8. Enrollment:** Act or process of enrolling; as at enlistment or registration; the number enrolled; also state of being enrolled.

**9. Register:** (a) A written record containing regular entrance of items or details; an official or formal enumeration, description or record of particulars; a memorial record. (b) To record formally and exactly, as for future use or service; to enroll; to enter precisely in a list or the like.

**10. Registration:** Act or fact of registering;

as, to require registration of voters; registration for a course of study in a college.

*Ballantine's Law Dictionary* defines "Register" as: To register is to enter in a register; to record formally and distinctly; to enroll; to enter in a list.

In *Words & Phrases*, Vol. 14A, page 301, it is stated that: "Enroll" means to make a record in writing; and to register. *Anderson v. Commonwealth*, 121 S.W. (2d) 46; 275 Ky. 232.

*Words & Phrases*, Vol. 36, page 648, defines a "Register" as an official record; and "To register" as to enter in a register; to record formally and distinctly; to enroll; to enter in a list. *Reck v. Phoenix Insurance Co.* 7 N.Y.S. 492, 54 Hun. 637.

*Words & Phrases*, Vol. 26A, page 339 defines "Matriculation" as the act of matriculating; and "To matriculate" as to enroll; to enter in a register; specifically, to enter or admit to membership in a body or society, particularly in a college or university, by enrolling the name in a register; to go through the process of admission to membership, as by examination and enrollment in a society or college. *State v. Regents of University System of Georgia*, 179 Ga. 210, 175 S.E. 567.

It would seem that the only words in Act 15 that may be found to be ambiguous are "registered at" and "admitted to" as contained in Section 1 of the act. Both of same may be given different meanings but taken together they clearly mean and refer to the process of matriculating at an Institution of Higher Learning. This conclusion appears to be clearly correct when the facts and conditions are considered.

It has been the custom from time immemorial for Institutions of Higher Learning to require applications from students, wherein their qualifications are stated and given. The application having been accepted and approved, the applicant is admitted as a student at the Institution. The student having been admitted, then chooses the college or school to be entered and the courses to be taken, etc. In those schools where dormitories are provided, the student is assigned a room and after paying all fees, he is finally registered or enrolled as a student. All of said process is most often referred to as matriculating at the Institution. A student is required to furnish his credentials only once and then at the time he is first admitted to the Institution. Most, if not all, Institutions require

that all students re-register at the beginning of each term or semester.

It is a rule and custom followed by virtually all Institutions of Higher Learning that changes in the rules for admission or graduation are made prospectively and are rarely, if ever, applied retrospectively to students already admitted and in attendance at the Institution. The same rule is followed by virtually all Institutions and particularly those whose members are admitted on credentials and experience, such as lawyers, doctors, etc. This same principle permeates our law as Article 8 of the Revised Civil Code, which provides as follows: "A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts".

The members of the Legislature for the most part are college graduates and familiar with the process of "registering" or "matriculating" at an Institution of Higher Learning and if the Legislature had intended that old students were to be required to furnish the certificate of eligibility, they would have so specifically provided and not left any such requirement to the interpretation of two possibly ambiguous words. We therefore conclude from what has been said that said Act 15 is not ambiguous.

Assuming, however, for the purpose of argument, that Act 15 is ambiguous, then the intent of the Legislature must be sought. Even so, such intent is to be gathered from the language of the entire act and the words used therein. The only words used that may be ambiguous are the words "registered at". It seems that all agree that the certificate of eligibility is required of all new students so the words "admitted to" are not in that respect ambiguous.

Act 15 is new and in adopting same the Legislature has invaded the field heretofore left to the administrators of the Institutions. The Institutions having properly functioned at all times heretofore, there could seemingly be no impelling reason why old students should be required to furnish the certificates of eligibility since thousands of students had previously been admitted to and graduated from said Institutions without having furnished any such certificate.

The argument that the words "registered at" are ambiguous and not synonymous with the words "admitted to" is presumably based on the fact that all students are required to register or re-register at the beginning of each term or semester. If said act is so interpreted, then the

words "shall be registered at" might possibly be given the meaning that all students in attendance at the summer schools of the Institutions of Higher Learning on the effective date of the act must immediately obtain certificates of eligibility and thereafter re-register at such Institution. Any such interpretation would make the statute harsh and unjust in its operation and such interpretation should, if possible, be avoided. *Houghton v. Hall*, 177 La. 237, 148 So. 37. It is also well settled that under the law, where a statute is susceptible of two constructions, such construction will be given that best comports with the principles of reason, justice and convenience. *State v. Randall*, 219 La. 578, 53 So. (2d) 689 and *State v. Standard Oil Co.* of La., 188 La. 978, 178 So. 601.

The words "registered at" must be interpreted with the words "shall be registered at or admitted to" as it is well settled that in construing a statute the meaning of a word or phrase may be ascertained by the meaning of other words and phrases with which it is associated. *Israel v. City of New Orleans*, 130 La. 980, 58 So. 850. When the entire phrase and sentence is considered with the remainder of the act, it forcibly appears that said phrase means the process of matriculation, and the Legislature wanted only to make certain that the entire process of matriculation was described, as the word "register" ordinarily means the final enrollment. This conclusion is further fortified by the additional reasons hereinafter shown.

The word "register" appears only once and then in the first sentence of Section 1 of the act. No other language is contained in said act that could be reasonably interpreted so as to lead one to believe that the word "register" meant anything other than to describe the last and final act of matriculating or enrolling, or that old students were to be required to furnish certificates. The title of the act only mentions "An Act establishing certain requirements for admittance" and if the word "admittance" means something different from the words "registered at", then the act is broader than its title and being a criminal statute could possibly be held to violate Section 16 of Article 3 of the Constitution of 1921. See *State v. Peterman*, 121 La. 620, 46 So. 672; *State v. Boylston*, 138 La. 21, 69 So. 890.

In the writer's opinion, it is extremely doubtful that the Court would hold the act broader than its title but at all events the fact that only

the word "admittance" was used in the title of the act is to be considered. Even though the title is not a part of the act, it was adopted by the Legislature and may be considered in ascertaining or determining the intent of the Legislature. *Pritchard v. Southern Insurance Co.*, 176 La. 187, 145 So. 374.

The certificate to be furnished by the student must obviously be furnished only once and the Legislature could not have possibly meant that said certificate must be presented and furnished prior to every registration by the student. In Section 2 of the act, the Department of Education is charged with the responsibility of preparing the form of the certificate and in sufficient quantities to satisfy the annual requirements of those seeking admission. In Section 3 of the act, notice is required to be thereafter given to the students graduating from Louisiana High Schools but there is some question as to who is charged with the responsibility of giving said notice. In said section, the Institutions are also required to incorporate in their annual catalogues proper notice that the certificate described in said act is an essential requirement for admission. In Section 4 of the act, it is provided that the act of an official or employee in admitting a student to the Institution without first having required the proper certificate constitutes a crime. In Section 4 of the act, the State Board of Education and the Board of Supervisors of L.S.U. are authorized and empowered to adopt such other entrance requirements as they may deem fit and proper.

The Department of Education in compliance with the provisions of said act, has prepared the form of the certificate and a copy obtained from said Department shows that it reads as follows:

• • •

**CERTIFICATE OF ELIGIBILITY FOR  
APPLICATION FOR ADMITTANCE TO  
LOUISIANA PUBLICLY FINANCED IN-  
STITUTIONS OF HIGHER EDUCATION  
AS PROVIDED BY ACT NO. 15 OF 1956.**

TO: Louisiana State University and Agricultural and Mechanical College, Baton Rouge, Louisiana

This is to certify that \_\_\_\_\_  
(name of applicant)

is a graduate of \_\_\_\_\_  
(name of High School)  
class of \_\_\_\_\_. In the opinion of the certi-

fiers, the applicant is of good moral character and is eligible for admittance to your institution, and is hereby recommended therefor.

Principal of High School, etc.	Supt. of Parish, City, County or Municipal- ity, etc.
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The Department of Education, in preparing the form of said certificate, prior to the issuance of any opinion from this office, evidently construed the act as applying only to students that are to be thereafter admitted rather than to students previously enrolled and thereafter registering at Institutions of Higher Learning. This contemporaneous construction of the statute by the Department of Education shows the interpretation of the act by educators and administrators and should be considered. State v. Southern Pacific Co., 137 La. 435, 68 So. 619.

In fact, the affidavits submitted show that there are certain requirements for a student to comply with prior to being admitted to any college and that unless he complies with these requirements he could not enroll or register and that thereafter these requirements are no longer necessary.

In conclusion, please be advised that it is the opinion of this office, for the reasons assigned in the original opinion, dated July 23, 1956 and for the reasons hereinabove assigned, the conclusions reached in the original opinion are correct and that a certificate of eligibility and good moral character is only required of students that are hereafter admitted to institutions of higher learning in the State of Louisiana and need not be furnished by students that are already enrolled and registered at such institutions.

With kindest personal regards, I am

Sincerely yours,

Jack P. F. Gremillion  
Attorney General

## GOVERNMENTAL FACILITIES

### School Buildings—Georgia

The Attorney General of Georgia had, on February 1, 1956, rendered an opinion to the state Superintendent of Schools concerning the use by white persons of school buildings and other facilities assigned to Negroes, and vice versa. On November 27, 1956, officials of the Chattooga County, Georgia, school system addressed an inquiry to the Attorney General with respect to the use of an athletic field of a white school for a football game to be played by Negro teams. In response to that request, a copy of the February 1, 1956, opinion was forwarded to the school authorities. That opinion follows:

February 1, 1956

Honorable M. D. Collins  
State Superintendent of Schools  
Department of Education  
State Office Building  
Atlanta, Georgia

Re: School Segregation

Dear Dr. Collins:

I am pleased to acknowledge your letter of January 27, 1956, as to a request from the Honorable Carl Scoggins. Your letter states that you advised Mr. Scoggins against using the same public school buildings for both whites and Negroes, but that he wanted an official opinion.

The laws of Georgia are abundantly clear as to the separation of the races in our public schools. "Separate schools shall be provided for the white and colored races." Georgia Constitution, Article VIII, Section I. See also Ga. Code Ann., § 32-909 and Ga. Laws 1955, pp. 174 et seq., "Colored and white children shall not attend the same schools." Ga. Code Ann., § 32-937.

In addition, many local bonds are issued for the purpose of financing the construction of school buildings for white or colored children. These school buildings are financed and built by the local voters of the school district as exclusively white or exclusively colored.

On the basis of the above authority, it is my opinion that a colored school building should

be considered as exclusively for the use of colored children in the morning, afternoon, and night. The same rule applies as to white school buildings. This would be true regardless of the type of instruction being given in the school building, i.e., academic, vocational or physical training.

For segregation to remain an integral part of

Georgia's social customs and traditions, it must and will be practiced twenty-four hours a day, seven days a week, and three hundred and sixty-five days a year.

With kindest regards and best wishes, I am

Sincerely yours,  
Eugene Cook  
The Attorney General

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point of greatest influence between the two groups  
and a small number of leaders, while the last  
stage has leaders and their close associates  
and a few well  
known figures.

John C. Calhoun  
John Quincy Adams  
Henry Clay

In 1860, 60 well-known names dominated and  
had personal influence over all members before  
leaving office, and the same can easily be done  
now, without it costing more than \$100,000.  
In fact, it need never cost more than \$100,000  
to bring to fruition a program put forward  
by other leaders in the name of India, or even

# REFERENCE

## FEDERAL JURISDICTION

### A Study of the Authorized Area of Action of United States Courts.

Courts of the United States (i.e., federal courts at any level) are normally limited in their power to hear and determine cases in contrast with state courts of general jurisdiction. These jurisdictional limitations in terms of subject matter are based upon both constitutional and statutory provisions. The limits of the judicial power of the regular federal court system, applicable to Congress as well as to the courts, are set out in Article III, Section 2, Clauses 1 and 2 of the Constitution of the United States, which read as follows:

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

In all Cases affecting Ambassadors, or other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Provision is made for the distribution of this power by Article III, Section I, which provides in part:

"The judicial Power of the United States, shall be vested in one supreme Court, and

in such inferior Courts as the Congress may from time to time ordain and establish."

Congress controls the exercise of federal judicial power not only by establishing inferior courts but by setting forth in Title 28 U.S.C. the extent to which, and the circumstances under which, these courts may pass upon matters contained in Article III, Section 2 of the Constitution. This Judicial Code of the United States likewise specifies (Title 28, U.S.C.A., c.81) the circumstances for the exercise of the appellate jurisdiction of the Supreme Court.

Normally, race relations cases will be brought in federal court because of a claim that they arise under the Constitution or a law of the United States<sup>1</sup>. Such cases might be brought to the federal courts in any of three available ways:

First, if the case is filed in a state court, one or more of the parties to the action may ask the Supreme Court of the United States to review the decision of a federal question rendered by the highest state court in which a decision could be had.

Second, the defendant in an action in a state court may remove to a United States district court under certain circumstances.

Third, the action may be filed originally in a United States District Court (1) under the general federal question provision of the Judicial Code if the required jurisdictional amount is present (28 U.S.C.A. § 1331) or (2) under the special provision of the Judicial Code for civil rights jurisdiction (28 U.S.C.A. § 1343). The possibility of other jurisdictional bases, such as diversity of citizenship (28 U.S.C.A. § 1332) and a certain type of election dispute (28 U.S.C.A. § 1344) should not be excluded but these will not be discussed in this study.

1. Thus far, no race relations case has been held to have "arisen" under any treaty. However, allegations of this jurisdictional ground have been made. See e.g., *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 71, 72, 75 S.Ct. 614, 99 L.Ed. 507, 1 Race Rel. L. Rep. 15, 16 (1955).

# REFERENCE

## 1. The Supreme Court

With respect to taking a case from the highest court of the state to the Supreme Court of the United States, Congress has made the following pertinent regulations in Title 28 of the United States Code:

**"§ 1257. State courts; appeal; certiorari**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In this statute, Congress has regulated the Supreme Court's review of state court decisions arising under the Constitution, laws and treaties of the United States. See Article III, Section 2, *supra*. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, L.Ed. 257 (1821) established the test for determining whether a case falls within this category:

"A case in law or equity . . . may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." 19 U.S. (6 Wheat.) at 379.

A case may arise under federal law even though the only contested issue is one of fact. The Supreme Court has said:

"That the question is one of fact does not

relieve us of the duty to determine whether in truth a federal right has been denied." *Norris v. Alabama*, 294 U.S. 587, 589-590, 55 S.Ct. 579, 79 L.Ed. 1074 (1935).

Thus the Supreme Court has the power to review those cases, decided by the highest available state court, which turn upon the construction of the Constitution or a law or treaty of the United States, or upon the establishment of the facts determining the application of either the Constitution, a law, or a treaty of the United States. In those situations in which certiorari is the only available method because of the provisions of Section 1257 *supra*, the losing party in the court below has no absolute right to a review but the granting or refusing of the writ of certiorari is within the discretion of the Supreme Court.

### METHODS OF RAISING POINTS AND PRESERVING EXCEPTIONS

The time, place and procedure for raising or preserving points of federal law in the state courts is usually determined by state law. *Edelman v. California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Nevada-California-Oregon Ry. v. Burrus*, 244 U.S. 103, 37 S.Ct. 576, 61 L.Ed. 1019 (1917). However, any attempt by a state court to deny a party access to a federal question through deciding a previous state question must withstand rigorous scrutiny by the Supreme Court.

"But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not thus be avoided." *Lawrence v. State Tax Comm.*, 286 U.S. 276, 282, 52 S.Ct. 556, 76 L.Ed. 1102 (1932).

Constitutional questions actually decided by the highest state court can be considered by the Supreme Court although they were not

properly raised in the trial court. In *Whitfield v. Ohio*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936), defendant, a citizen of Alabama, was charged in an Ohio court with the violation of an Ohio statute aimed at the prevention of competition with ordinary articles of commerce by similar, prison-manufactured articles. Upon conviction, he appealed ultimately to the United States Supreme Court, alleging that the Ohio statute violated the Fourteenth Amendment and the commerce clause of the United States Constitution, and that a federal statute declaring prison-manufactured articles were not to be treated as items of interstate commerce, was an unlawful delegation of Congressional power. Mr. Justice Sutherland said, for the court:

"The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that that court considered and passed upon [the defendant's contentions]. . . . These questions, therefore, are properly here for consideration." 297 U.S. at 435, 436.

However, the federal question must have been substantially raised before the case reaches the Supreme Court, and the court's jurisdiction is limited to questions so raised. New, unrelated questions cannot be considered. As Mr. Chief Justice Fuller phrased the rule in *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U.S. 626, 20 S.Ct. 205, 44 L.Ed. 299 (1900):

"... [W]here a Federal question is raised in the state courts, the party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in any of the courts below."

To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner." 175 U.S. at 633, 634.

In some cases the Supreme Court has decided federal questions not expressly passed upon by the state courts after finding that the questions were necessarily involved in the state court decisions. See, e.g., *Tilt v. Kelsey*, 207 U.S. 43, 28 S.Ct. 1, 52 L.Ed. 95 (1907) and *Yazoo & Mis-*

*sissippi Valley R.R. Co. v. Adams*, 180 U.S. 1, 21 S.Ct. 240, 45 L.Ed. 395 (1901).

The form of the allegation of unconstitutionality is not important; the substance is the determining factor with the Supreme Court. This proposition was set out as follows in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928):

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." 278 U.S. at 67.

#### *Appeal or Certiorari*

A decision of the highest state court which affirms the validity of a state statute as applied to a particular transaction, in face of an allegation that such an application violates the United States Constitution, is reviewable by appeal as distinguished from certiorari. 28 U.S.C.A. § 1257 (2). Thus, in *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927), where defendant was charged with violation of a state statute making criminal syndicalism a felony, the Supreme Court commented on this procedural point as follows:

"A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable [as of right] . . ." 274 U.S. at 385.

On the other hand, when the validity of the statute is not attacked, but some constitutional right is alleged to have been infringed, the only review available is by certiorari. *Dana v. Dana*, 250 U.S. 220, 39 S.Ct. 449, 63 L.Ed. 947 (1919); *Philadelphia & Reading etc. Co. v. Gilbert*, 245 U.S. 162, 38 S.Ct. 58, 62 L.Ed. 221 (1917).

## RACE RELATIONS CASES

Several recent cases involving charges of unconstitutional racial discrimination have been carried from state courts of last resort to the United States Supreme Court. For example, in *Gebhart v. Belton*, one of the cases consolidated for decision in the *School Segregation Cases*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), 1 Race Rel. L. Rep. 5 (1956), the Supreme Court took jurisdiction by granting a writ of certiorari, running to the Supreme Court of Delaware.

Other cases considered in the same manner include *Florida ex rel. Hawkins v. Board of Control of Florida*, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112 (1954), 1 Race Rel. L. Rep. 13 (1956) (university segregation); *Reece v. Georgia*, 350 U.S. 76, 76 S.Ct. 167, 100 L.Ed. 109 (1955), 1 Race Rel. L. Rep. 20 (1956); *Michel v. Louisiana*, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 114 (1955), 1 Race Rel. L. Rep. 23 (1956) (grand juries); *Williams v. Georgia*, 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed. 1161 (1955), 1 Race Rel. L. Rep. 29 (1956) (petit jury).

## 2. Original Jurisdiction of United States District Courts

### GENERAL FEDERAL QUESTION JURISDICTION

The Constitution does not create courts inferior to the Supreme Court nor does it fix the jurisdiction of courts created by Congress. Within the limits set by the Constitution Congress determines the jurisdiction of the inferior federal courts but cannot extend the jurisdiction beyond those limits. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 12 L.Ed. 1147 (1850); *Lockerty v. Phillips*, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943).

To implement Article III, Section 2 of the Constitution (quoted *supra*) Congress has created several classes of courts and defined their jurisdiction. At the present the principal trial courts in the federal system are the district courts. 28 U.S.C.A. §§ 81-132. Their general federal question jurisdiction is described in 28 U.S.C.A. § 1331 which reads as follows:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

In what actions does the matter in controversy arise under the Constitution, laws, or treaties of the United States for purposes of this section? As pointed out previously the Supreme Court has said that a case arises under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379, 5 L.Ed. 257 (1821). But there the court was speaking of its own jurisdiction to review state-

court judgments. As applied to district courts the proposition of *Cohens v. Virginia* is limited by the doctrine that the jurisdiction of a federal court is to be determined as of the time that the case comes to the court. The result of the latter doctrine is that the existence of the federal question as a basis for the trial court's jurisdiction must be disclosed by the plaintiff's proper pleading of his own case without anticipation of a probable defense. *Devine v. Los Angeles*, 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046 (1906). Resort may not be had to defendant's answer for the purpose of disclosing a federal question and thus establishing jurisdiction in the district court. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

Mr. Justice Cardozo said in the court's opinion in *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936):

"How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. [Citing cases.] The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. [Citing cases.] A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto [Citing cases], and the controversy must be disclosed upon the face of the complaint,

unaided by the answer or by the petition for removal. [Citing cases] Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." 299 U.S. at 112-113.

The idea that to be within the jurisdiction of the federal courts the action must involve a genuine controversy or real dispute as to federal law has been criticized by writers who point out that it is impossible to tell from the complaint what will be controverted by the defendant. Chadbourne and Levin, *Original Jurisdiction of Federal Questions*, 90 U.Pa.L.Rev. 639, 671 (1942); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum.L.Rev. 157, 169, 170 (1953). Furthermore, it seems that jurisdiction exists, if the complaint presents an "action arising," although the only issue when the pleadings are closed, is one of fact. *Doucette v. Vincent*, 194 F.2d 834, 845 (1st Cir. 1952).

#### Holmes' View

The view that a suit arises under the law that creates the cause of action was advocated by Mr. Justice Holmes. *American Well Works Co. v. Lane & Bowler Co.*, 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 (1916) and his dissenting opinion in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 213, 41 S.Ct. 243, 65 L.Ed. 577 (1921). Undoubtedly a suit on a cause of action created by federal law arises under federal law. But some cases have been held to be within the jurisdiction of district courts although the right of action was created by state law where federal law was an essential ingredient of the cause of action. *Smith v. Kansas City Title & Trust Co.*, *supra*; *Hopkins v. Walker*, 244 U.S. 486, 37 S.Ct. 711, 61 L.Ed. 1270 (1917).

#### Sufficiency of the Complaint

In any event it is necessary to distinguish between the question of jurisdiction and the question of the sufficiency of the complaint to state a cause of action. In *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), the court said of an action against F.B.I. agents for damages:

"Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the

way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of \$3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent, the party who brings a suit is master to decide what law he will rely upon, and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill. *The Fair v. Kohler Die Co.*, 228 U.S. 22, 25. . . ." 327 U.S. at 681.

"Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. *The Fair v. Kohler Die Co.*, *supra*, 228 U.S. at page 25. But cf. *Swafford v. Templeton*, *supra*. [185 U.S. 487].

"But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought." 327 U.S. at 682-683.

". . . Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction." 327 U.S. at 685.

### *Declaratory Judgments*

It seems from decisions in certain patent cases that federal jurisdiction of a given declaratory judgment action exists if it would exist in a coercive action by either party against the other. *E. Edelman & Co. v. Triple-A Specialty Co.*, 88 F.2d 852 (7th Cir. 1937). See *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 67 S.Ct. 416, 91 L.Ed. 374 (1947). *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 69 S.Ct. 269, 93 L.Ed. 235 (1949). Where neither party could sue the other in a federal court about the same subject matter and obtain a judgment upon which execution could be issued, jurisdiction of a declaratory judgment action was held to be lacking. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 845 (1950). The courts established under Article III of the United States Constitution can decide only justiciable cases or controversies. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1946). Whether a declaratory judgment action presents such a case or controversy depends upon the facts of the particular action. Compare the *Mitchell* case with the *Katzinger* and *Jungersen* cases, *supra*, and *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000 (1937). See generally Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 Vand. L. Rev. 445 (1954).

### *Jurisdictional Amount*

As shown by the language of 28 U.S.C.A. § 1331 a civil action can be brought in a district court on the general ground that the matter in controversy arises under the Constitution, laws, or treaties of the United States only if the matter in controversy exceeds the sum or value of \$3000 exclusive of interest and costs. Whether it does or not is to be tested by the value of the object or right to be protected, and the party who asks the court to exercise jurisdiction must allege in his pleading the facts essential to show jurisdiction and he has the burden of proof with regard to them. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936). The presence or absence of the jurisdictional amount is to be determined from the matter directly in dispute and not by consideration of the effect of collateral estoppel.<sup>2</sup>

2. Under the doctrine of collateral estoppel a judgment, whether in favor of plaintiff or defendant, is

*Elgin v. Marshall*, 106 U.S. 578, 1 S.Ct. 484, 27 L.Ed. 249 (1882); *Healy v. Ratta*, 202 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248 (1934). Nor may a group of claims be aggregated in a single suit in order to reach the required amount.

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Pinel v. Pinel*, 240 U.S. 594, 596, 36 S.Ct. 416, 60 L.Ed. 817 (1916).

The same rule was applied in *Walter v. Northeastern R.R. Co.*, 147 U.S. 370, 374, 13 S.Ct. 348, 37 L.Ed. 206 (1893), to multiple defendants. There the court said:

"In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff."

The rule applies to an action to enjoin the collection of separate claims by defendants even though they depend for their validity upon a common origin; but an exception exists where defendants acted in combination or conspiracy. In that case the value of the matter in controversy is the aggregate of the defendants' claims. *Sovereign Camp, Woodmen of the World v. O'Neill*, 266 U.S. 292, 45 S.Ct. 49, 69 L.Ed. 293 (1924).

A general allegation of the jurisdictional amount in the language of the statute seems to be sufficient. See Rules of Civil Procedure for the United States District Courts, Appendix of Forms, Form 2; *McNutt v. General Motors Acceptance Corporation*, *supra*. Although the pleading of the amount would be done in the same way whether the action is for damages or for an injunction, there is a difference concerning what must be proved. As a general rule, in an action for damages, the value of the matter

conclusive in a subsequent action between the parties on a different cause of action as to issues raised in the subsequent action if those issues were actually litigated and decided in the prior action. See *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948).

in controversy is the amount claimed by the plaintiff in good faith; but in an action for injunction, if the allegation of the value or sum is disputed, substantial evidence thereof is required. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

#### Race Relations Cases

In many race relations cases it will be clear that the cause of action was created by the Constitution or a law of the United States. However, in actions for injunctions against segregation the difficulty involved in placing a value on the matter in controversy may raise a problem concerning the jurisdictional amount. The difficulty has been avoided in some cases by invoking the jurisdiction of the district court under the "civil rights" provision, 28 U.S.C.A. § 1343 (which does not have a jurisdictional amount requirement), as well as under Section 1331. *Willis v. Walker*, 136 F.Supp. 181 (W.D. Ky. 1955) 1 Race Rel. L.Rep. 66 (1956); *Borough v. Jenkins*, 137 F.Supp. 260, (E.D. Okla. 1955) 1 Race Rel. L.Rep. 71 (1956). See also *Brewer v. Hoxie School District*, 1 Race Rel. L.Rep. 1027 (8th Cir. 1956). In the latter case the school district sought an injunction against obstruction of the operation of integrated schools. The United States Court of Appeals for the 8th Circuit held that jurisdiction of the district court rested on Section 1331 and on Section 1343 also. Although the court said that the matter in controversy exceeded the sum of \$3000, the manner of arriving at this conclusion was not disclosed. A similar use has been made of Section 1337 (jurisdiction under statutes regulating interstate commerce) to supplement Section 1331. *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499, n.5, (2nd Cir. 1956) 1 Race Rel. L.Rep. 356, n.5 (alleged racial discrimination in transportation).

The court, in *Brewer v. Hoxie School District*, *supra*, had before it on appeal an unusual suit which was treated as arising under the Constitution because of a right said to arise by necessary implication. The plaintiffs were the school district, its board of directors and superintendent. They alleged that following the decision of the Supreme Court in the *School Segregation Cases* segregation had been brought to an end in the schools of the district and the integrated schools operated smoothly until the de-

fendants, White Citizens Council of Arkansas and other organizations and individuals, entered into and carried on a conspiracy of obstruction. The court, after discussing the traditional tests for deciding when an action arises under the Constitution or laws of the United States, said:

"The remedy prayed for was injunction and jurisdiction of the federal courts to issue injunction to protect rights safeguarded by the Constitution is well established. . ." 1 Race Rel. L.Rep. at 1031.

"The principles enunciated by the Supreme Court in the School Segregation Cases are binding upon plaintiffs in this case, as well as on all other school boards or school officials administering public education programs. For in practical effect, the rights and duties of not only the immediate parties to the cases before the Supreme Court were at issue but also the rights and duties of all others similarly situated. See 347 U.S., at 495.

"Plaintiffs are under a duty to obey the Constitution. Const. Art. VI, cl.2. They are bound by oath or affirmation to support it and are mindful of their obligation. It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposed duty. The right arises by necessary implication from the imposition of the duty as clearly as though it had been specifically stated in the Constitution. In many cases the implied rights which have been upheld by the courts have been of far less importance than the right against being interfered with in obeying the Constitution which is here involved. . ." 1 Race Rel. L.Rep. at 1032.

"In the case at bar we think there is no question that plaintiff school board members may be protected by a federal injunction in their efforts to discharge their duty under the Fourteenth Amendment." 1 Race Rel. L.Rep. at 1034.

*Syres v. Oil Workers International Union, Local No. 23*, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 78 (1955), 1 Race Rel. L.Rep. 20 (1956), was an action for injunction against alleged racial discrimination concerning employment. Plaintiffs sought to invoke the jurisdiction of the district court under 28 U.S.C.A. § 1331. See the opinion of the Court of Appeals for the Fifth

Circuit denying jurisdiction of the district court. 223 F.2d 739 (5th Cir. 1955), 1 Race Rel. L.Rep. 192 (1956). The Supreme Court reversed, sustaining the jurisdiction. The point with which the courts concerned themselves was not the jurisdictional amount but the question of whether the action arose under federal law.

### SPECIAL CIVIL RIGHTS JURISDICTION

The history of the original jurisdiction of the federal trial court in civil rights litigation has largely centered upon: (1) the trend of legal thought concerning the delicate balance of power between the state and central governments in the federal system; and (2) various attempts to reconcile the general grant of federal-question jurisdiction to the district courts requiring a minimum jurisdictional amount with the specific grant of civil rights jurisdiction not requiring any allegation of specific monetary damages. While the problem of relating the powers of the national and state governments in this field has been frequently litigated in the past and certain lines may now be drawn with a degree of clarity, the basic conflict must be considered as a part of the background in any discussion of this topic. The distribution of state and federal power was the basis of the decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), which interpreted the Fourteenth Amendment in a manner that seems to have severely limited federal jurisdiction of civil rights cases for an extended period. Mr. Justice Miller, writing for the majority, noted the court's consideration of the problem:

"In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

" . . . .

"But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal

Power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or any of its parts." 83 U.S. (16 Wall.) at 81-82).

The problem of interpreting Section 1343(3) of the Judicial Code, 28 U.S.C.A. § 1343(3) which grants civil rights jurisdiction to federal district courts so as to reconcile it with 28 U.S.C.A. § 1331 which grants general federal question jurisdiction has caused no little difficulty. Of prime importance in current thought is the reconciliation made by Mr. Justice Stone. Writing a separate opinion in *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) he stated:

"Since the two provisions stand and must be read together, it is obvious that neither is to be interpreted as abolishing the other. . . . By treating [§ 1343(3)] as conferring federal jurisdiction of suits brought under the Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous, and give to each a scope in conformity with its history and manifest purpose." 307 U.S. at 530.

These problems may seem more suitable for consideration by the legal theorist, but the question becomes important to any litigant seeking to complain of or defend against an alleged deprivation of civil rights in the federal district courts, if the value of the matter in controversy is less than the jurisdictional amount under 28 U.S.C.A. § 1331, or if the jurisdictional amount cannot be proven.

#### *The Civil Rights Statutes*

Jurisdiction over civil rights cases is specifically granted to the federal district courts by Section 1343 of the Judicial Code without the requirement of the jurisdictional amount set out in Section 1331. By this section:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege

or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C.A. § 1843 (Supp. 1955).

The authorization for the civil action referred to in the introduction to Section 1843 is found in Section 1983 of Title 42. That section provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. § 1983 (Supp. 1955).

This is the present codification of the "Civil Rights Bills" originating in the Act of 1866 and later acts designed to enforce the Thirteenth and Fourteenth Amendments.

This section lay dormant for many years, until the civil rights litigation in recent years brought it into considerable use. The natural result of this long period of relative disuse with extended gaps in its application has been a lack of coherent judicial interpretation of the meaning of the language in the section.

The jurisdictional statute uses the language "right, privilege or immunity secured by the Constitution of the United States," 28 U.S.C.A. § 1843, while the basic civil rights statute similarly provides legal protection for "rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C.A. § 1983. The infrequency with which this statute was used as a means of gaining access to the district courts until relatively recently may be traced to the interpretation of the privileges and immunities clause of the Fourteenth Amendment made in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873). In those cases the plaintiffs complained of a Louisiana statute which created a corporation with monopoly powers for the landing and slaughtering of livestock in the City of New Orleans. It was asserted that the act in question deprived "a large and meritorious class of citizens—the whole of

the butchers of the city—of the right to exercise their trade," and the suit directly presented the question whether freedom to pursue lawful civil employment was a privilege guaranteed by the Constitution. The Court distinguished state and national citizenship on the basis of the first clause of the Amendment and held that the protection of the privileges and immunities clause did not extend to those fundamental rights incident to state citizenship; the privileges or immunities of citizens of the United States were confined to a limited class of interests incident to national citizenship and owing their existence to the federal government, its constitution and laws. Thus, the clause was virtually eliminated by this first significant judicial analysis of the Fourteenth Amendment because the rights ostensibly protected were covered by previous provisions and amendments of the Constitution.

#### *The Doctrine of the Virginia Coupon Cases*

In *Carter v. Greenhow*, 114 U.S. 317, 5 S.Ct. 928, 29 L.Ed. 202 (1884), an action was brought in the circuit court of the United States alleging that "the defendant deprived the plaintiff of a right secured to him by the Constitution of the United States, under color of statutes enacted by the General Assembly of the State of Virginia, to the damage of the plaintiff two hundred dollars (\$200)." 114 U.S. at 320. The declaration set forth that plaintiff was a resident and property owner in the city of Richmond, and defendant, the city treasurer, whose duties included the collection of state taxes on property situated within the city. Plaintiff was indebted for state taxes lawfully assessed and tendered in payment coupons cut from bonds of the State of Virginia. Such method of payment had been authorized by an act of the General Assembly providing for the settlement of the public debt and the act under which the coupons were issued, each coupon bearing on its face the contract of the state that it should be received in payment of taxes due. This tender was refused by the defendant under color of a later act of the general assembly forbidding collectors to accept in payment of taxes due anything except certain forms of currency. Plaintiff alleged that this later act was void in that it violated his right to pay taxes in coupons instead of money, and that the right was secured to him by the Constitution of the United States under Article I, Section 10,

forbidding any state to pass laws impairing the obligation of contracts. Plaintiff brought suit under the Civil Rights Act and claimed jurisdiction under the predecessor of Section 1343 of the Judicial Code, which granted original jurisdiction to the federal court without reference to the sum in controversy. A general demurrer to the declaration was sustained in the circuit court and affirmed by the Supreme Court. In affirming, the court set out that the Constitution only indirectly "secured" plaintiff's individual right to non-impairment of contract by state law—that is, if such a law were passed by the state legislature he had a right to a judicial determination declaring it a nullity. For this purpose his remedy lay in the state courts with ultimate review by the Supreme Court or by the original suit in the circuit court where the value of the sum in dispute exceeded the jurisdictional amount. As to the rights protected by the Civil Rights Act, the court stated:

"It might be difficult to enumerate the several descriptions of rights secured to individuals by the Constitution, the deprivation of which, by any person, would subject the latter to an action for redress under [42 U.S.C.A. § 1983]; and, fortunately, it is not necessary to do so in this case. It is sufficient to say that the declaration now before us does not show a cause of action within its terms." 114 U.S. at 323.

*Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374 (1900), was a suit brought in the circuit court of the United States for the District of Indiana to enjoin the collection of certain state taxes assessed against the capital stock of the plaintiff corporation on the value of letters patent from the United States owned by the company. Complainant charged that the assessment was unconstitutional and averred that the suit was instituted "to redress the deprivation, under color of a law of the State of Indiana, of a right secured by the laws of the United States" (§ 1343). Plaintiff's further contention that the suit was one arising under the patent laws of the United States was rejected by the court of appeals and the rejection summarily affirmed by the Supreme Court. General federal question jurisdiction (§ 1331) was not claimed because the taxes in question did not reach the then jurisdictional amount of two thousand dollars (\$2,000). Citing *Carter v. Greenhow, supra*, the Supreme Court directed

a dismissal of the bill for lack of federal jurisdiction. With reference to the Civil Rights Act and its companion jurisdictional statute, the court stated, "it is sufficient to say that they refer to civil rights only and are inapplicable here." 176 U.S. at 72.

In 1913 a bill was presented in the United States District Court for Arizona to enjoin certain defendants as officers of the state from enforcing the provisions of an act of the state legislature for the regulation of railroad crews. *Simpson v. Geary*, 204 Fed. 507 (D. Ariz. 1913). The act complained of established minimum train crews and prescribed certain experience requirements for the members thereof with appropriate penalties provided for non-compliance by any railroad-employer. The bill alleged that the complainants were employees of a railroad regulated by the act and had been notified by their employer that they were not eligible to retain their positions under its terms and would be replaced. Federal aid was sought by way of injunction and, as the annual salary of each complainant did not meet the jurisdictional amount requirement, federal jurisdiction was alleged under the predecessor of section 1343. Citing *Holt v. Indiana Mfg. Co., supra*, the court dismissed the bill for lack of jurisdiction; and referring to the jurisdictional statute in question, stated:

"The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regulating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil right of such persons are invaded, and the protection of the federal Constitution can be invoked to protect the individual in his employment or calling." 204 Fed. at 512.

Two years later the same court cited the above case as authority for establishing federal jurisdiction without regard to the amount in controversy in a suit to enjoin the enforcement of an allegedly unconstitutional state act. *Raich v. Truax*, 219 Fed. 273, 283 (D. Ariz. 1915). There the act complained of provided that any employer of more than five workers at any one

time shall employ not less than eighty per cent qualified electors or native-born citizens of the United States or some subdivision thereof and prescribed appropriate penalties for any violation of terms. Complainant was a native of Austria and alleged that the act in question denied him the equal protection of the laws guaranteed by the Fourteenth Amendment to all persons within the United States whether citizens or aliens. With no further reference to the jurisdictional question the requested relief was granted, the court holding that the act in question was not a valid exercise of the police powers of the state. On direct appeal, the Supreme Court affirmed the decision without comment on the jurisdictional point. *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 181 (1915).

*Crane v. Johnson*, 242 U.S. 339, 37 S.Ct. 176, 61 L.Ed. 348 (1917), was an appeal from a ruling of a three-judge court in a suit to enjoin enforcement of an allegedly unconstitutional state statute. The lower court had taken jurisdiction on the authority of *Truax v. Raich*, *supra*, but denied the application for injunction as an order within the sound discretion of the court. *Crane v. Johnson*, 233 Fed. 334 (S.D. Cal. 1916). The declaration stated that complainant was a "drugless practitioner" and averred that the statute, which created a board of medical examiners empowered to provide a course of study and examination for those practicing medicine, was a violation of his rights under the equal protection clause of the Federal Constitution. The alleged discrimination was in favor of treatment by prayer and other religious practices which were specifically exempted from the terms of the statute. The Supreme Court merely restated the jurisdictional authority cited by the lower court and proceeded to affirm the decision after a discussion of the merits.

After summarizing the authority to date, Judge Learned Hand set forth a restrictive interpretation of the statutory predecessor of section 1343(3) in *Marcus Brown Holding Co. v. Pollak*, 272 Fed. 137 (S.D.N.Y. 1920). The suit was brought by a landlord against his tenant and law enforcement officers of the state to restrain the tenant from occupancy of the leased premises after expiration of his lease and to enjoin the enforcement of certain emergency acts depriving landlords of the right to evict tenants by summary proceedings. The court found that if the statute in question were en-

forced the complainant's pecuniary loss would be less than three thousand dollars (\$3,000), and the case turned on the question of whether jurisdiction could rest on the Civil Rights Act without regard to the amount in controversy. The question was answered in the negative and the bill dismissed; referring to the *Slaughter-House Cases*, *supra*, Judge Hand stated:

"Those cases . . . hold that the general right of property does not have its origin in the Constitution and that the Fourteenth Amendment is not constitutive of [rights, privileges and immunities secured by the Constitution of the United States]. It is in this sense that we understand [§ 1343(3)] to use the word 'secure.' Were it not so, all matters arising 'under the Constitution,' as prescribed in [§ 1331], would be justiciable under [§ 1343(3)], and the amount in controversy would never be a condition upon our jurisdiction, when a constitutional point was raised. This is certainly not the law." 272 Fed. at 141.

In 1937 an action was brought in federal district court to enjoin the enforcement of a certain regulation adopted by the defendant board of school directors. *Gobitis v. Minersville School Dist.*, 21 F.Supp. 581 (E.D. Pa. 1937). The regulation in question required all teachers and pupils to salute the American flag as a part of the daily class exercises and provided that a refusal to do so should be regarded as an act of insubordination and dealt with accordingly. The plaintiffs, Walter Gobitis and his two minor children, were members of a body known as Jehovah's Witnesses and conscientiously opposed saluting the flag on religious grounds. Because of their refusal to take part in the required salute, the minor plaintiffs were expelled from the public schools. Suit was brought alleging a violation of the Fourteenth Amendment, and the jurisdictional issue was squarely raised by the defendants' motion to dismiss the bill for failure to state a cause of action and for lack of federal jurisdiction. After concluding that a good cause of action was stated, the court discussed plaintiffs' claim of jurisdiction under the predecessor of Section 1343 and found that it did not have jurisdiction under that section, stating:

"[P]laintiff's rights are not secured by the Federal Constitution but are secured if at

all, by the Constitution and laws of Pennsylvania. . . . The privileges and immunities protected by [the Fourteenth] Amendment are only those that belong to citizens of the United States as distinguished from citizens of the states—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources. . . . Nor does the due process clause secure to the plaintiffs the rights in question. That clause merely protects existing personal liberties from undue abridgment by the states. It does not itself secure to individuals any new or additional liberties. [§ 1343(3)] relates only to rights secured by the Constitution or laws of the United States." 21 F.Supp. at 586.

On the further claim of federal jurisdiction over the case as one involving \$3,000 and arising under the Constitution of the United States (§ 1331), the court found in plaintiffs' favor and denied the motion to dismiss the bill. Under a provision of the Pennsylvania School Code the minor plaintiffs were required to attend a day school until they attained eighteen years of age, and the Code further provided that any parent failing to comply with the compulsory attendance provision would be guilty of a misdemeanor. Citing this statute, the court held the jurisdictional amount to be satisfied because it was the senior plaintiff's right and duty to educate his children and it could not be ruled, as a matter of law, that it would cost less than \$3,000 to complete this education in private schools. The requested injunction was granted at the hearing on the merits. 24 F. Supp. 271 (E.D. Pa. 1938). In that opinion the court specifically found the amount in controversy to be in excess of \$3,000 by aggregating the cost of a private education for the two children. The court of appeals affirmed without discussion of the jurisdictional question, 108 F.2d 683 (3d Cir. 1939), but the Supreme Court reversed the decision on the merits also without discussing federal jurisdiction, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940). [This decision of the Supreme Court was subsequently overruled in *Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943)].

The case of *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), squarely presented the jurisdictional issues necessarily propounded by most suits alleging a deprivation of

civil rights. That decision contains the Supreme Court's most sweeping discussion of the problem and, to a certain extent, is still the last word on interpreting the scope of original federal jurisdiction under section 1343(3) of the Judicial Code. The suit was brought by unincorporated labor organizations joined by individuals and sought to enjoin certain municipal officers from enforcing ordinances forbidding the distribution of printed matter, and the holding of public meetings without permits from the Director of Public Safety. The bill charged that acting under color of these ordinances the defendants had prevented complainants from assembling and disseminating information to workingmen about the National Labor Relations Act. The bill further charged that the ordinances were unconstitutional and void and the complainants had been deprived of the privilege of free speech and peaceable assembly secured to them as citizens of the United States by the Fourteenth Amendment. Federal jurisdiction was alleged to exist under the general grant of federal question authority requiring the jurisdictional amount (§ 1331), and under the specific grant of civil rights jurisdiction (§ 1343(3)).

#### *Has Jurisdiction*

The district court concluded that it had jurisdiction under both sections and the court of appeals concurred in that finding. On certiorari the Supreme Court denied the existence of original jurisdiction under Section 1331. Distinguishing actions at law where the amount necessary to jurisdiction would have been determined by the sum claimed in good faith, Mr. Justice Roberts stated on this point:

"[I]t does not follow that in a suit to restrain threatened invasions of such rights a mere averment of the amount in controversy confers jurisdiction. In suits brought under [§ 1331] a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of the plaintiff of facts justifying the conclusion that the suit involved the necessary sum." 307 U.S. at 507-08.

However, with the two justices dissenting and two taking no part, the finding of original jurisdiction under Section 1343(3) was sustained

though the majority divided in assigning reasons therefor.

Mr. Justice Roberts, with whom Mr. Justice Black concurred, found that the freedom to disseminate information concerning the provisions of the National Labor Relations Act and to assemble peaceably for its discussion were privileges or immunities of a citizen of the United States secured by the Fourteenth Amendment, and for whose abridgment access to the federal courts was afforded under Section 1343(3). Referring to the *Slaughter-House Cases*, he stated:

"Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects." [Footnote omitted.] 307 U.S. at 512.

Mr. Justice Stone, with whom Mr. Justice Reed concurred, found that,

"freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." 307 U.S. at 519.

In his view the real issue in the case was then, "whether the present proceeding can be maintained under [§ 1343(3)] of the Judicial Code as a suit for the protection of rights and privileges guaranteed by the due process clause." 307 U.S. at 525.

Thus, Mr. Justice Stone distinguished the privileges and immunities clause of the Fourteenth Amendment from the similar phrase found in the Civil Rights Act and the jurisdictional statute. He reasoned that the civil rights statute "protected" all constitutional rights, privileges and immunities of which the "privileges or immunities of citizens of the United States" covered by the Fourteenth Amendment constituted only a part. This distinction made it unnecessary to find, as Mr. Justice Roberts had done, that the asserted rights of the complainants were within that limited class of privileges

and immunities which grow out of the relationship of United States citizens to the national government. It should be noted that Mr. Justice Stone's view makes it possible to continue the limitation placed on the operation of the privileges and immunities clause of the Fourteenth Amendment by the *Slaughter-House Cases*, which construction Mr. Justice Stone felt was being unnecessarily enlarged in Mr. Justice Robert's opinion. By basing his decision on an expanded scope of the meaning of the rights, privileges or immunities redressable under the Civil Rights Act rather than those secured by the Fourteenth Amendment, Mr. Justice Stone made it unnecessary for complainants to depend upon their limited privileges as United States citizens or their particular right to discuss the National Labor Relations Act in order to maintain the suit. The remainder of his separate opinion was devoted to an explanation of original federal jurisdiction under sections 1331 and 1343(3) of the Judicial Code. On this point he noted that suits authorized under the latter statute were literally suits "arising under the Constitution or laws of the United States" and theoretically cognizable under the general federal question section. However, the continued presence of both statutes since 1875 indicated a congressional intent that they should be read together with neither absorbing the other. With this premise, the opinion proceeded to set forth the theory of harmonization that section 1343(3) confers jurisdiction where "the right asserted is inherently incapable of pecuniary valuation." After illustrating this construction by reference to *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374 (1900), and *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915), Mr. Justice Stone summed up the jurisdictional issue:

"The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under [§ 1343(3)] of the Judicial Code to entertain it without proof that the amount in controversy exceeds \$3,000." 307 U.S. at 531-32.

Mr. Chief Justice Hughes delivered a separate opinion expressing concurrence on the jurisdictional point in part with Mr. Justice Roberts and in part with Mr. Justice Stone. Mr. Justice McReynolds and Mr. Justice Butler dissented on the merits, expressing no opinions on the existence of federal jurisdiction.

#### *Post-Hague Cases in the Supreme Court*

*Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1824 (1943), was a suit to enjoin the enforcement of a city ordinance which allegedly abridged the freedoms guaranteed to complainants by the First Amendment. The complaint set up that plaintiffs were Jehovah's Witnesses and that in the practice of their religion they make, and for many years have made, house to house distribution of books and pamphlets setting forth their interpretations of the Bible. The ordinance in question provided that all persons soliciting orders for merchandise of any kind within the city or distributing articles under orders so obtained without first procuring a license and paying a nominal license tax would be subject to a prescribed fine or imprisonment. Plaintiffs, who refused to procure the required license, further alleged that they have been repeatedly arrested and prosecuted under the authority of the ordinance in violation of their civil rights. Thus, the question of whether a federal district court had statutory jurisdiction to entertain such a suit was again before the court. In delivering the opinion of the majority, Mr. Chief Justice Stone followed the reasoning he had adopted in the *Hague* case on the scope of federal jurisdiction over suits brought under the Civil Rights Act without allegation or proof of any jurisdictional amount. After noting that the Fourteenth Amendment made applicable to states the guarantees of the First, he stated:

"Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance. It follows that the bill, which amply alleges the facts relied on to show the abridgment by criminal proceedings under the ordinance, sets out a case or

controversy which is within the adjudicatory power of the district court." 319 U.S. at 162.

The holding of the *Slaughter-House Cases* that the privileges and immunities clause of the Fourteenth Amendment does not protect rights derived solely from the relationship of a citizen and his state established by state law was reiterated in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). This was an action for damages brought in a federal district court in Illinois against the members of the State Primary Canvassing Board. The complaint alleged that the defendants, acting as members of the board but in violation of state law, deprived the plaintiff of nomination and election to a seat in the state house of representatives by their refusal to certify correctly the results of his successful candidacy in a primary. The complaint further set out that this action of the defendants deprived the plaintiff of rights, privileges and immunities secured to him as a citizen of the United States, and of the equal protection of the laws, in contravention of the Civil Rights Acts; and that federal jurisdiction was established under the predecessor of Sections 1331, 1343(1) and 1343(3) of the Judicial Code. In another opinion by Mr. Chief Justice Stone, the applicability of the privileges and immunities clause was denied on the basis of its restrictive interpretation in the *Slaughter-House Cases*. On the issue of whether plaintiff was denied the equal protection of the laws, it was held:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." 321 U.S. at 8.

"[T]he necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

"A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." *Id.* at 11-12.

Because of the lack of any allegations tending to show a purposeful discrimination between persons or classes of persons, the complaint was dismissed for failure to state a cause of action within the jurisdiction of the district court.

*Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), was a civil action for damages brought on the authority of the statutory predecessor of 42 U.S.C.A. § 1983. The alleged violation of complainant's civil rights was a refusal by defendant election judges to permit him to vote in the Democratic primary solely because of his race and color. This refusal was by virtue of a resolution adopted by the Democratic party in a state convention limiting its membership to white citizens. On the jurisdictional point, the court merely stated that the district court had jurisdiction under Section 1343(3). The court of appeals did not discuss the question of federal jurisdiction and the opinion of the district court has not been reported.

#### Race Relations Cases

As early as 1896, jurisdiction was taken of a race relations suit by a district court under the deprivation-of-civil-rights provisions. §1343(3). The case, *Davenport v. Cloverport*, 72 Fed. 689 (D. Ky. 1896), involved an action by Negroes against the governing board of a publicly supported white high school in which the plaintiffs asked that the defendants be enjoined from disbursing funds in their custody otherwise than equally among all children residing in the district.

The requirement of Section 1343(3) that the deprivation be under color of any state law, etc., has been used on occasion to justify declining to take jurisdiction. E.g., *Johnson v. Levitt & Sons, Inc.*, 181 F.Supp. 114 (E.D. Pa. 1955), 1 Race Rel. L. Rep. 158 (1956). In a case filed in a federal district court in California the point was raised but the decision of the court of appeals was in favor of the jurisdiction. Children of Mexican descent had been segregated by school district officials of Orange County. Some of the children brought the suit seeking an injunction and invoking jurisdiction under Section 1343. There was no California law authorizing segregation and the defendants contended that the acts complained of were not done under color of state law. The court of appeals pointed out that the school officials had the function under state law of admitting or excluding chil-

dren from each of the schools in the district and held that this satisfied the jurisdictional statute's requirement concerning color of state law. *Westminster School District of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

Jurisdiction under Section 1343 has been sustained in actions by Negro applicants for declaratory judgments against universities (*Johnson v. Board of Trustees of University of Kentucky*, 83 F.Supp. 707, E.D. Ky. 1949; *Wrighten v. Board of Trustees of University of S. C.*, 72 F.Supp. 948, E.D. S. C. 1947), by persons excluded on account of race from government-operated places of recreation (*Holmes v. Atlanta*, 124 F.Supp. 290, N. D. Ga. 1954, 1 Race Rel. L. Rep. 146, 1956, affirmed 223 F.2d 93, 5th Cir. 1955, 1 Race Rel. L. Rep. 149, 1956, vacated and remanded with direction 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. \_\_\_, 1955, 1 Race Rel. L. Rep. 14, 1956, golf courses; *Williams v. Kansas City, Mo.*, 104 F.Supp. 848, W.D. Mo. 1952, affirmed 205 F.2d 47, certiorari denied 346 U.S. 826, 74 S.Ct. 45, 98 L.Ed. 351, 1953, swimming pool; *Lopez v. Seccombe*, 71 F.Supp. 769, S. D. Cal. 1947, swimming pool and park facilities), by Negro teachers asking a declaratory judgment or an injunction against salary discrimination (*Thompson v. Gibbes*, 60 F.Supp. 872, E.D. S.C. 1945; *Davis v. Cook*, 55 F.Supp. 1004, N. D. Ga. 1944; *Thomas v. Hibbitts*, 46 F.Supp. 368, M.D. Tenn. 1942; *Mills v. Board of Education*, 30 F.Supp. 245, D. Md. 1939), and by children seeking an injunction against segregation in a city's schools (*Allen v. School Board of the City of Charlottesville*, 1 Race Rel. L. Rep. 886, W. D. Va. 1956; *Romero v. Weakley*, 226 F.2d 399, 9th Cir. 1955, 1 Race Rel. L. Rep. 48, 1956). This last case says:

"Since the parties agree that the only issues involved in the case are whether the alleged facts admittedly violating the Federal and State Constitutions are true, we have for decision a federal constitutional question purely of fact." 226 F.2d at 401.

The usual pattern of race relations cases consists of an action alleging racial discrimination against the plaintiff or plaintiffs. A case which does not follow the pattern is *Hoxie School District No. 46 v. Brewer*, 137 F.Supp. 364 (E. D. Ark. 1956), 1 Race Rel. L. Rep. 299, 1956, affirmed sub nom. *Brewer v. Hoxie School District No. 46*, 1 Race Rel. L. Rep. 1027 (8th Cir. 1956). The suit was brought by the school

district, its directors, and the superintendent of schools to enjoin a White Citizens Council and other organizations and individuals from interfering with the integration of the public schools of Hoxie, Arkansas. The federal district judge issued the injunction, taking jurisdiction under both Section 1331 and Section 1343. The court of appeals affirmed, apparently approving both grounds of jurisdiction. Because it was found that the matter in controversy exceeded the sum of \$3000 exclusive of interest and costs, the reliance on Section 1343 was not necessary to the decision in favor of jurisdiction. Indeed, the case, in holding that, although there is jurisdiction under the special civil rights provision, the right asserted was capable of pecuniary valuation, raises a question as to whether the decision is consistent with the opinion of Mr. Justice Stone in *Hague v. C.I.O.*, *supra*.

The *Hoxie* opinion of the court of appeals finds that the plaintiff school officials have an implied right to be free from interference with their performance of the duty to integrate the schools imposed by the Constitution and connects this federal right with the discussion of the civil rights jurisdiction by saying that the board's right is thus intimately identified with the right of the children themselves. With regard to the civil rights jurisdiction the court cited 42 U.S.C.A. § 1985(3) which authorizes an action for the recovery of damages to compensate for injuries resulting from a conspiracy to interfere

with civil rights. This section, together with 28 U.S.C.A. § 1651, providing that the federal courts may issue all lawful writs necessary or appropriate in aid of their respective jurisdictions, was thought to support the issuance of the injunction. The court also held that the identity of interest between the school board and the school children was sufficiently close so as to permit the school board to assert the rights of the school children under the Fourteenth Amendment, saying,

"Though generally speaking, the right to equal protection is a personal right of individuals, this is 'only a rule of practice' (*Barrow v. Jackson*, 346 U.S. 249, 257) which will not be followed where the identity of interest between the party asserting the right and the party in whose favor the right directly exists is sufficiently close." 1 Race Rel. L. Rep. at 1036.

On the point that the Fourteenth Amendment applies only to state action the opinion says that if defendants' illegal conduct succeeded in coercing the school board to rescind its desegregation order such rescission could be accomplished only through state action.

As shown in the discussion of Race Relations Cases at Page 275, *supra*, plaintiffs in at least two other cases have combined jurisdictional allegations under §§ 1331 and 1343 of 28 U.S.C.A.

### 3. Removal Jurisdiction of United States District Courts

If the plaintiff files in a state court any civil action of which the state court has subject-matter jurisdiction (*General Investment Co. v. Lake Shore etc. Ry. Co.*, 260 U.S. 261, 43 S.Ct. 106, 67 L.Ed. 244 (1922); compare 28 U.S.C.A. § 1447a) and of which the federal district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, the defendant or defendants may remove the action to the federal district court. 28 U.S.C.A. § 1441 (a)(b). Any other such action may be removed only if the defendants properly joined and served are not citizens of the state in which the action is brought. *Ibid.* Whenever plaintiff joins one or more otherwise non-removable claims with a separate, independent and removable claim, the entire case may be removed; the district court

in its discretion may determine the entire case or remand matters not otherwise within its original jurisdiction. § 1441(c).

A civil action or criminal prosecution against any officer of the United States or of any agency or court thereof for any act under color of office (28 U.S.C.A. § 1442) or against any person who is denied civil rights or is sued or prosecuted for any act under any law providing for equal rights or for refusing to do any act on the ground that it would be inconsistent with such law (§ 1443), is removable. The last two sections cited also cover other cases not pertinent to race relations.

Promptly after the filing in the district court of the petition for removal, the defendant must give written notice to all adverse parties and file a copy of the petition with the clerk of the state court. This accomplishes the removal; no

order is necessary. See § 1446(e). Plaintiff, if he wishes to contest the removal, presents his contention that the action is not removable by making a motion to remand. See § 1447(c). An order remanding the case is not reviewable. § 1447(d).

#### Race Relations Cases

It seems unlikely that Section 1441, the general removal provision, will be used very much in race relations cases. Speaking generally, it is the plaintiffs rather than the defendants who will wish to bring into the federal courts race relations cases which are covered by this section. On the other hand, Section 1442 may play a part in the contest over segregation provided federal officers come in conflict with state governments. Should cases be brought against the

officers in state courts, attempts might be made to remove them. It also is possible that persons charged with violations of state segregation laws will seek to invoke Section 1443. In *North Carolina v. Jackson*, 135 F.Supp. 682 (M.D. N.C. 1955), 1 Race Rel. L. Rep. 357 (1956), the accused was prosecuted for violating a North Carolina statute providing for segregation of the races in intrastate buses. He removed the case to the United States District Court, claiming that the statute violated the Fourteenth Amendment and that he could not get a fair trial in the state court. The district court remanded the case to the North Carolina court on motion of the attorney for the state. The federal judge said that it would be improper for him to presume that the state judges would refuse to uphold the law of the land.

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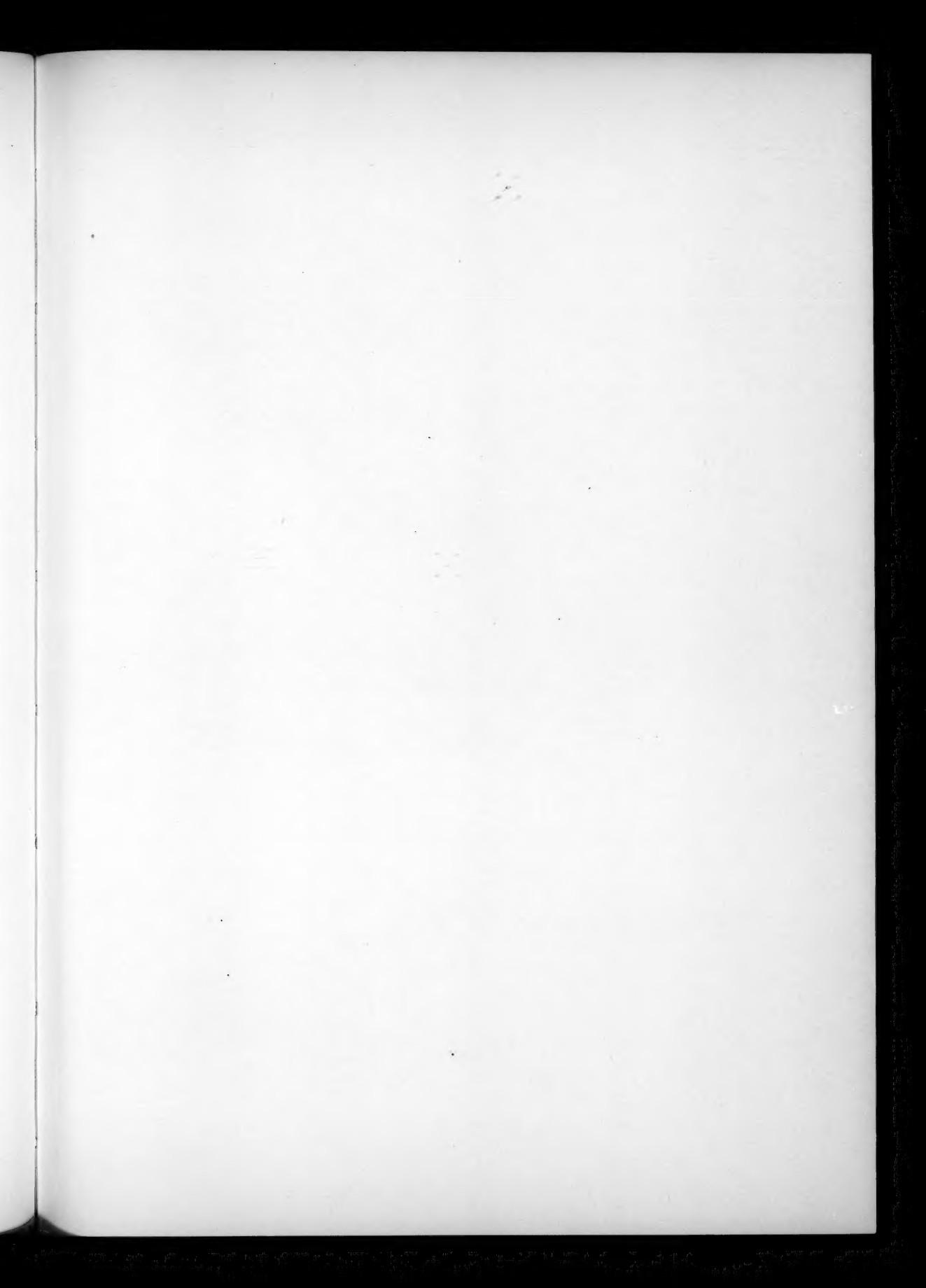
# TABLE OF CASES

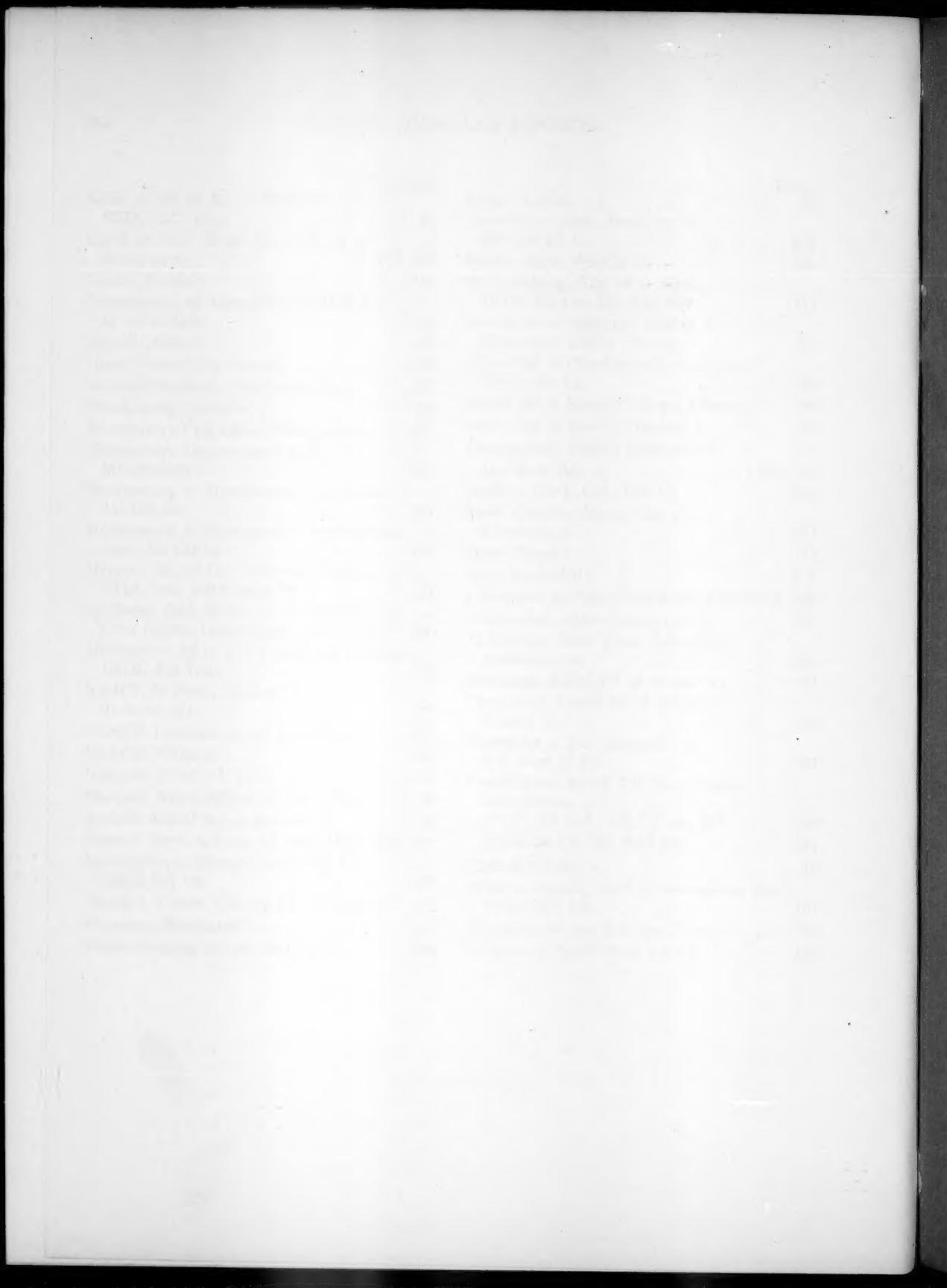
## VOLUME 2, NUMBER 1

CASES PRINTED IN THIS ISSUE, Vol. 2, No. 1, are listed by the official style, with any citations, in *italic* type and by reverse citations in Roman type. A table of cases for Volume 1 appears at page 1167 of that Volume.

	Pages		Pages
<i>Adkins v. Sch Bd of Newport News,</i> USDC ED Va	46	<i>Clark; Smith v.</i>	200
<i>Alabama ex rel. Patterson v. NAACP</i>	177	<i>Clayton Sch Dist No. 119 Bd of Trustees;</i> <i>Evans v.</i>	7
<i>Alabama; Fikes v.</i>	5	<i>Connecticut Comm on Civil Rights;</i> <i>McKinley Park Homes v.</i>	160
<i>Allen v. Merrell,</i> Utah Sup Ct, 305 P.2d 490	166	<i>Dade County Bd of Public Instr;</i> <i>Gibson v.</i>	9
<i>Allen; School Bd of Charlottesville v.</i>	59	<i>Dallas Transit Co; Frazier v.</i>	146
<i>Alsup; City of St Petersburg v.</i>	119	<i>Derrington v. Plummer,</i> USCA 5th Cir	117
<i>Anderson v. Atlanta Newspapers, Inc.,</i> Ga Sup Ct	204	<i>Driscoll Consolidated Independent Sch Dist;</i> <i>Hernandez v.</i>	34
<i>Anderson County Bd of Ed; McSwain v.</i>	26	<i>Echols; Harris v.</i>	163
<i>Arlington County, School Bd v. Thompson</i>	59	<i>Erie Railroad Co; Thompson v.</i>	237
<i>Atlanta Newspapers Inc; Anderson v.</i>	204	<i>Estate of Stephen Girard,</i> In re, Pa Sup Ct, 127 A.2d 287	68
<i>Avery v. Wichita Falls Ind Sch Dist,</i> USCA 5th Cir	28	<i>Evans v. Bd of Trustees of Clayton Sch</i> <i>Dist No. 119,</i> USDC Del, 145 F.Supp. 873	7
<i>Bell v. Rippy,</i> USDC ND Tex, 146 F.Supp. 485	32	<i>Evert; Ross v.</i>	151
<i>Beckett v. Sch Bd of Norfolk,</i> USDC ED Va	46	<i>Fikes v. Alabama,</i> USSC, ____U.S____, 77 S.Ct. 281	5
<i>Birmingham Dist, Housing Auth of;</i> Watts v.	107	<i>Flemming v. S.C. Elec. &amp; Gas Co.,</i> USCA 4th Cir	144
<i>Bd of Ed of Anderson County;</i> McSwain v.	26	<i>Frazier v. Dallas Transit Co.,</i> Tex Dist Ct	146
<i>Bd of Ed of Harford County;</i> Moore v.	11	<i>Garmon v. Miami Transit Co.,</i> USDC SD Fla	129
<i>Bd of Ed of Nashville;</i> Kelley v.	21	<i>Gibson v. Bd of Public Instr of Dade</i> County, USDC SD Fla	9
<i>Bd of Ed of Tennessee;</i> Booker v.	64	<i>Girard, Estate of</i>	68
<i>Bd of Public Instr of Dade County;</i> Gibson v.	9	<i>Gremillion, Louisiana ex rel. v. NAACP</i>	185
<i>Bd of Trustees of Clayton Sch Dist</i> No. 119; Evans v.	7	<i>Harford County, Bd of Ed; Moore v.</i>	11
<i>Booker v. Bd of Ed of Tennessee,</i> USCA 6th Cir	64	<i>Harris v. Echols,</i> USDC SD Ga, 146 F.Supp 607	163
<i>Browder v. City of Montgomery,</i> USDC MD Ala, 146 F.Supp. 127	126	<i>Hernandez v. Driscoll Consolidated</i> <i>Independent Sch Dist,</i> USDC SD Tex	34
<i>Carson v. Warlick,</i> USCA 4th Cir, 238 F.2d 724	16	<i>Heyward v. Public Housing Admin,</i> USCA 5th Cir, 238 F.2d 689	109
<i>Charlottesville, School Bd v. Allen</i>	59	<i>Housing Auth of Birmingham Dist;</i> Watts v.	107
<i>Cities Transit Inc v. Tallahassee,</i> USDC ND Fla	137	<i>Inter Civic Council of Tallahassee v.</i> Tallahassee, USDC ND Fla	143
<i>Cities Transit, Inc; Tallahassee v.</i>	135		

Pages		Pages	
<i>Kelley v. Bd of Ed of Nashville,</i> USDC MD Tenn	21	Rippy; Bell v. <i>Rosenthal v. State</i> , Tenn Sup Ct, 292 S.W.2d 1	32 176
<i>Lee Kum Hoy</i> , United States ex rel. v. Shaughnessy	189, 193	<i>Ross v. Evert</i> , Wis Cir Ct	151
<i>Linson</i> ; People v.	171	<i>St Petersburg, City of v. Alsup</i> , USCA 5th Cir, 238 F.2d 830	119
<i>Louisiana ex rel. Gremillion v. NAACP</i> , La Ct of App	185	<i>School Bd of Arlington County v.</i> Thompson, USCA 4th Cir	59
Merrell; Allen v.	166	<i>School Bd of Charlottesville v. Allen</i> , USCA 4th Cir	59
Miami Transit Co; Garmon v.	129	<i>School Bd of Newport News</i> ; Adkins v.	46
Missouri Pacific Ry Co; Pennington v.	157	<i>School Bd of Norfolk</i> ; Beckett v.	46
Montgomery; Browder v.	126	Shaughnessy; United States ex rel. <i>Lee Kum Hoy</i> v.	189, 193
Montgomery City Lines; Montgomery v.	121	<i>Smith v. Clark</i> , Colo Dist Ct	200
Montgomery Improvement Assn; Montgomery v.	123	South Carolina Elec & Gas Co; Flemming v.	144
<i>Montgomery v. Montgomery City Lines</i> , Ala Cir Ct	121	State; Payne v.	171
<i>Montgomery v. Montgomery Improvement</i> Assn, Ala Cir Ct	123	State; Rosenthal v.	176
<i>Moore v. Bd of Ed of Harford County</i> , USDC Md, 146 F.Supp. 91	11	<i>Tallahassee v. Cities Transit Inc</i> , Fla Cir Ct	185
<i>McKinley Park Homes v. Commission on</i> Civil Rights, Conn County Ct	160	Tallahassee; Cities Transit Inc. v.	137
<i>McSwain v. Bd of Ed of Anderson County</i> , USDC ED Tenn	26	Tallahassee; Inter Civic Council of Tallahassee v.	143
<i>NAACP, Ex Parte</i> , Ala Sup Ct, 91 So.2d 214	177	Tennessee, Bd of Ed of; Booker v.	64
NAACP; Louisiana ex rel. Gremillion v.	185	Thompson; School Bd of Arlington County v.	59
NAACP; Williams v.	181	<i>Thompson v. Erie Railroad Co</i> , N.J. Dept of Ed	237
Nashville Bd of Ed; Kelley v.	21	<i>United States ex rel. Lee Kum Hoy v.</i> Shaughnessy, USDC SD N.Y., 183 F.Supp. 850	189
Newport News, School Bd of; Adkins v.	46	USCA 2d Cir, 237 F.2d 307	193
Norfolk, School Bd of; Beckett v.	46	Warlick; Carson v.	16
<i>Payne v. State</i> , Ark Sup Ct, 295 S.W.2d 312	171	<i>Watts v. Housing Auth of Birmingham Dist</i> , USDC ND Ala	107
<i>Pennington v. Missouri Pacific Ry Co</i> , USCA 8th Cir	157	Wichita Falls Ind Sch Dist; Avery v.	28
<i>People v. Linson</i> , Cal Sup Ct, 303 P.2d 537	171	<i>Williams v. NAACP</i> , Ga Cir Ct	181
Plummer; Derrington v.	117		
Public Housing Admin; Heyward v.	109		





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